SHOULD I STAY OR SHOULD I GO? A GUIDE TO CHANGE OF VENUE IN ALABAMA CRIMINAL COURTS

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When the prosecution and the defense in a criminal jury trial present their case, the proceedings have to take place in a courtroom somewhere. The Alabama Constitution guarantees a criminal defendant "in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed."[2] However, issues may arise that cause a need to move the trial to a venue where the defendant can receive a trial before a fair and impartial jury.[3] This comment will examine the foundations of substantive and procedural law surrounding change of venue in Alabama's criminal courts. This examination will review guarantees under the United States Constitution and federal case law as well as the relevant Alabama constitutional provisions, statutes, procedural rules, and court decisions. The ultimate purpose of this comment is to attempt to provide a comprehensive analysis of change of venue and how Alabama courts are guided in reaching their decisions regarding whether to transfer a defendant's case from the county with original jurisdiction to "the nearest county free from exception."[4] Additionally, this comment will also seek to address questions and confusion that can arise with change of venue while also looking to how recent case law may shape future criminal trials.

In addition to providing a review of and commentary on the "black letter law" of change of venue in Alabama, this comment will

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[2] ALA. CONST. art. I, § 6.

[3] *See id.* ("[B]ut the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment . . . ."); ALA. CODE § 15-2-20(a) (LexisNexis 2011) ("Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found."); *see also* ALA. R. CRIM. P. 10.1(a) (using similar language as § 15-2-20(a)).

[4] ALA. CODE § 15-2-24 (LexisNexis 2011).

also provide a study of a recent case in which a defendant moved for a change of venue. This comment will analyze the case surrounding the arrest and pre-trial proceedings of Harvey Updyke, the man who was accused of and ultimately pled guilty to the poisoning of Auburn University's Toomer's Corner oak trees.[5] This analysis will demonstrate the operation of the known law to a real fact scenario where a judge, ultimately, did not have to make a challenged ruling.[6]

I. GUARANTEE TO A TRIAL BY A FAIR AND IMPARTIAL JURY

As a matter of basic jurisprudence, the Sixth Amendment of the United States Constitution guarantees a criminal defendant a trial by a fair and impartial jury in the jurisdiction in which the crime occurred.[7] The United States Supreme Court incorporated this right under the Fourteenth Amendment and made the right applicable to the states in 1968.[8] The State of Alabama recognized the right to a fair and impartial jury in the State's constitution, which was ratified in 1901.[9] However, Alabama courts have recog-

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[5] Ed Enoch, *Harvey Updyke Case From 2011 Until 2013 (Timeline)*, AL.COM (March 22, 2013, 10:30 PM), http://blog.al.com/montgomery/2013/03/harvey_updyke_case_from_2011_u.html.

[6] While the trial court did change venue for the case from the original county, Lee County, to Elmore County, this ruling followed the prosecution's withdrawing opposition to the change. *See* Order Granting Motion to Change Venue, State v. Updyke, CC-2011-000492.00–.05 (Lee Cnty., Ala. Cir. Ct. March 13, 2013) [hereinafter Court Order] (on file with author); Notice of Withdrawal of State's Opposition to Change of Venue, State v. Updyke, CC-2011-492.00–.05 (Lee Cnty., Ala. Cir. Ct. March 11, 2013) [hereinafter Withdrawal of Opp.] (on file with author). The author would like to note that the purpose of the analysis of the Updyke case is not to pass judgment on any trial strategy or tactical decisions made by either the prosecution or the defense in this case, and the author has no intentions to pass judgment on any decisions made by the trial court, either. Having been professionally acquainted with the attorneys and judges in this case, the author has utmost respect for all of those involved in this case. The review of the Updyke case is solely an illustrative and practical exercise involving change of venue.

[7] U.S. CONST. amend. VI; *see also Ex parte* Longmire, 584 So. 2d 503, 504–05 (Ala. 1991) ("In all prosecutions by indictment the accused has a right to a speedy public trial by an impartial jury in the county in which the offense was committed." (quoting Swain v. Alabama, 380 U.S. 202, 211 n.7 (1965), *rev'd on other grounds*, Batson v. Kentucky, 476 U.S. 79 (1986))).

[8] Duncan v. Louisiana, 391 U.S. 145, 147–49 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

[9] ALA. CONST. art. I, § 6.

nized the need for fair and impartial juries prior to the ratification of the current constitution.[10]

As part of the State's guarantee to a fair and impartial jury, the Alabama Constitution allows for changes in venue to ensure that the defendant will face a suitable jury.[11] However, this constitutional provision does not act independently because the provision clearly states that an act of the legislature is required to provide the mechanism for changing venue.[12] The Code of Alabama, 1975 (hereinafter, "the Code"), does provide several statutes regarding change of venue in pursuance of a fair trial as a guarantee of due process.[13] Also, provisions of the Alabama Rules of Criminal Procedure address change of venue.[14] This comment will further discuss Alabama's statutory provisions governing change of venue, the procedural rules and process for moving for a change of venue, and the factors Alabama courts consider when considering whether to change the of venue of trial.

II. ALABAMA'S STATUTES AND PROCEDURAL RULES REGARDING CHANGE OF VENUE AT TRIAL

As mentioned above, the Alabama Constitution provides for the legislature to enact laws regarding change of venue.[15] Section 15-2-20 of the Code grants authority for motions to change venue, provides for appellate review of decisions regarding denial of change of venue motions, and specifies when the defendant is not required to be present in court for the motion proceedings.[16] Alabama law, under section 15-2-21, also allows the trial judge to order—with the consent of the defendant—a change of venue *sua sponte* to protect the proceedings from the risk of mob violence.[17] The Code states that the trial "must be removed to the nearest county free from exception."[18] Furthermore, if the trial court does grant a motion for change of venue, the case can only be removed

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[10] *See Ex parte* Hodges, 59 Ala. 305, 305 (1877).
[11] ALA. CONST. art. I, § 6.
[12] *See id.*; Patterson v. State, 175 So. 371, 374 (Ala. 1937) ("[T]he Constitution does not expressly guarantee to a defendant the right to a change of venue, but leaves the question to the discretion of the Legislature.").
[13] *See* ALA. CODE §§ 15-2-20 to -27 (LexisNexis 2011); *see also*, Wilson v. State, 480 So. 2d 78, 80 (Ala. Crim. App. 1985).
[14] *See* ALA. R. CRIM. P. 10.1–10.3.
[15] *See* ALA. CONST. art. I, § 6; *Patterson*, 175 So. at 374.
[16] ALA. CODE § 15-2-20 (LexisNexis 2011).
[17] *Id.* § 15-2-21.
[18] *Id.* § 15-2-24.

that one time.[19] While these basic rules seem fairly straightforward, research and discussion below will show that these rules have distinct nuances and generate a great deal of litigation in finding the bounds of these laws.

The Alabama Constitution also grants the Alabama Supreme Court the ability to promulgate procedural rules governing state courts as long as "such rules [do] not abridge, enlarge[,] or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein."[20] In 1991, the Alabama Supreme Court enacted the current Alabama Rules of Criminal Procedure, including three rules addressing changing venue.[21] Following the adoption of those rules, the Alabama Supreme Court noted that when a procedural rule and a statute address the same topic, the court's rule will supersede the law.[22] The Alabama Legislature has also recognized the superiority of the court's rules by adopting a statute that grants deference to the court's rules.[23] Accordingly, when reviewing the statutes and rules, attorneys must look to whether the Alabama Rules of Criminal Procedure specifically address an issue regarding change of venue or if court decisions following the adoption of the rules imply recognition of the effectiveness of the statutes.

A. Making the Motion to Change the Place of Trial

In allowing for motions for change of venue, section 15-2-20(a) of the Code allows a defendant in a criminal trial to make an application with the court to transfer the trial to another county, and the application or motion must enumerate the reasons why the defendant cannot receive a fair trial in the county where he was charged.[24] The law requires that the motion "be made as early as practicable before the trial."[25] Additionally, if after a defendant's conviction, a court grants the defendant a new trial, the defendant

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[19] *Id. But see* Hines v. State, 384 So. 2d 1171, 1184 (Ala. Crim. App. 1980) (allowing for a second change when due process requires such a move in the interest of a fair trial). *Hines* is discussed further in Part II.G.2 *infra*.

[20] ALA. CONST. art. VI, § 150, *amended by* ALA. CONST. amend. 328.

[21] ALA. R. CRIM. P. 10.1–10.3; *Ex parte* Sorsby, 12 So. 3d 139, 147 (Ala. 2007) (noting that the Alabama Rules of Criminal Procedure became effective January 1, 1991).

[22] *Ex parte Sorsby*, 12 So. 3d at 147 (quoting *Ex parte* Oswalt, 686 So. 2d 368, 370–71 (Ala. 1996)).

[23] *See* ALA. CODE § 15-1-1 (LexisNexis 2011).

[24] *Id.* § 15-2-20(a).

[25] *Id.*; *see also* ALA. R. CRIM. P. 10.1(c) ("A motion for change of place of trial shall be made on oath and at the earliest opportunity prior to trial.").

may move for a change of venue for the new trial.[26] While the plain language of the statute states that the person charged with the crime must make the application to change venue, the Alabama Supreme Court rejected the assertion that the defendant must actually make or sign the motion, and a motion signed and filed by the defendant's attorney is sufficient.[27] Furthermore, Alabama law does not require the defendant, personally or through his attorney, to make the application for change of venue in writing.[28] However, Alabama law requires that the defendant or his attorney swear to the motion or make the motion under oath, and courts have ruled that the failure to do so is a fatal procedural error.[29]

In providing a process for moving to change the place of trial, Alabama Rule of Criminal Procedure 10.1 states that a criminal defendant is entitled to a change of venue "to the nearest county free from prejudice if a fair and impartial trial and an unbiased jury cannot be had for any reason."[30] In addition to prejudice,[31] the court also has the authority to move the trial to avoid "mob violence."[32] Rule 10.1 also requires that the defendant to make his motion "at the earliest opportunity prior to trial."[33] "[A]t the earliest opportunity prior to trial" indicates that a motion to change venue must precede the initiation of trial proceedings and jury selection.[34] The timing requirement, presumably, attempts to prevent the defendant from filing frivolous eleventh-hour change of venue motions in order to delay an impending trial. Arguably, if a risk to the safety of the defendant or the integrity of the proceed-

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[26] § 15-2-20(a).

[27] *Ex parte* Lancaster, 89 So. 721, 722 (Ala. 1921). In *Ex parte Lancaster*, the Alabama Supreme Court interpreted a different statute than section 15-2-20, however the wording of the old statute is substantially the same as the current law. *Compare* § 15-2-20(a), *with Ex parte Lancaster*, 89 So. 2d at 722 (quoting the 1907 Alabama statute).

[28] *Ex parte Lancaster*, 89 So. at 722.

[29] *See* Ivery v. State, 686 So. 2d 495, 513 (Ala. Crim. App. 1996) (noting the defendant's motion to change venue was not made on oath as required by ALA. R. CRIM. P. 10.1(c)); Callahan v. State, 557 So. 2d 1292, 1306 (Ala. Crim. App. 1989) (motion to change venue was procedurally defective because defendant did not swear to the motion); Sparks v. State, 450 So. 2d 188, 190 (Ala. Crim. App. 1984) (cited by *Ivery* and noting that defendant's motion was not verified under oath and was properly denied according to § 15-2-20).

[30] ALA. R. CRIM. P. 10.1(a).

[31] Prejudice and its forms are discussed in detail in Section III *infra.*

[32] ALA. R. CRIM. P. 10.1(a).

[33] ALA. R. CRIM. P. 10.1(c).

[34] *See* Stewart v. State, 623 So. 2d 413, 415 (Ala. Crim. App. 1993).

ings exists, a less drastic measure of continuing the trial may be a more appropriate pre-trial remedy.[35]

The discussion regarding the appropriateness of changing the place of a trial also warrants assessment of the structure of Alabama's Unified Judicial System[36] in order to provide additional context for when to apply to change the place of trial. The Code specifies that "[a]ny person charged with an indictable offense may have his trial removed to another county."[37] Rule 10.1 has similar language, stating that defendant is entitled to a change of venue (when meeting the threshold burden) in cases of indictable offenses or de novo trials where the defendant demands a jury.[38] According to state law, "[a]ll felonies and all misdemeanors originally prosecuted in the district court or circuit court are indictable offenses."[39] In Alabama, the circuit courts hold jury trials for felony offenses.[40] Additionally, circuit courts also hear appeals of misdemeanor convictions from district and municipal courts de novo and before a jury.[41] Thus, if a defendant is found guilty in a bench trial in a district court or municipal court,[42] he can appeal his case to the circuit court for a de novo trial before a jury[43] and apply for a change of venue if he believes he will not receive a fair trial before an impartial jury.[44] Thus, the application of Rule 10.1 for change of

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[35] *See* United States v. Skilling, 561 U.S. 358, 384–85 (2010) (discussing that trial court attempted to abate prejudice for one of the infamous Enron scandal defendants by delaying the beginning of the trial). *But see* Wiggins v. State, 104 So. 2d 560, 563 (Ala. Ct. App. 1958) ("[A] motion for continuance should not lie on the ground of community prejudice; a motion for a change of venue is the proper expedient . . . . However, these motions seem sometimes to be treated alternatively.").

[36] The judicial system in Alabama is unified into one system consisting of the Alabama Supreme Court; the Court of Civil Appeals; the Court of Criminal Appeals; and the various circuit, district, probate, and municipal courts throughout the state. ALA. CODE § 12-1-2 (2012).

[37] *Id.* § 15-2-20(a).

[38] ALA. R. CRIM. P. 10.1(a)–(b).

[39] ALA. CODE § 15-8-2 (2012).

[40] *See id.* § 12-11-30(2) (stating that circuit courts have exclusive original jurisdiction over all felony prosecutions).

[41] *Id.* § 12-11-30(3). Having a jury during an appeal to the circuit court is an option and not a requirement. *See id.*

[42] District courts in Alabama conduct juryless bench trials. *Id.* § 12-12-3. Trials in municipal courts are also bench trials. *Id.* § 12-14-6.

[43] ALA. R. CRIM. P. 18.1(a), 30.1(a).

[44] ALA. R. CRIM. P. 10.1 cmt. The comment to Rule 10.1 notes that in bench trials before the district court, if the defendant believes the trial judge is biased, motion for recusal is the proper remedy. *Id.* If mob violence is a concern, then "a change of place of trial might lie from district court." *Id.*

venue is not limited to initial felony jury trials, but also in misdemeanor appellate cases.

B. Burden of Proof in Moving to Change Venue

After making his application to change the place of trial, the accused has the burden of proving that he will be unable to receive a fair jury trial in the original county.[45] This contrasts with the State's initial burden to prove the offense occurred within the jurisdiction of the original court;[46] however, once the State establishes the offense took place within the jurisdiction of the trial court, the burden shifts to the defendant.[47] The defendant must prove "to the reasonable satisfaction of the court that a fair and impartial trial and an unbiased verdict cannot be reasonably expected in the county in which the defendant is to be tried."[48] In meeting this burden, courts have held that "mere belief" that the defendant cannot receive a fair trial is not enough.[49] In meeting the reasonable satisfaction of the court, the defendant must prove facts and circumstances that would render a fair trial improbable.[50]

C. Defendant's Presence at Hearing

The criminal defendant has the right to be present at all stages and hearings for trial.[51] Generally, a waiver of that right requires the defendant to appear in court and waive his appearance, or the defendant can give a written waiver filed with the clerk.[52] In either circumstance, the defendant can waive his presence only "[w]ith the consent of the court."[53] Under certain circumstances, the trial court can excuse the defendant's absence if the court finds from the evidence that the defendant had notice of the hearing and had

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[45] *See* ALA. R. CRIM. P. 10.1(b).
[46] *See* Buffo v. State, 415 So. 2d 1146, 1154 (Ala. Crim. App. 1980) (State has the burden of proving venue), *rev'd on other grounds*, 415 So. 2d 1158 (Ala. 1982).
[47] *See, e.g.*, Acoff v. State, 278 So. 2d 210, 216 (Ala. Crim. App. 1973) (citing Tiner v. State, 122 So. 2d 738, 745 (Ala. 1960); Dannelly v. State, 254 So. 2d 434, 435 (Ala. Crim. App. 1971)).
[48] ALA. R. CRIM. P. 10.1(b); *see also* Patton v. State, 21 So. 2d 844, 845 (Ala. 1945) (citing Godau v. State, 60 So. 908, 910 (Ala. 1913)); Nelson v. State, 440 So. 2d 1130, 1131 (Ala. Crim. App. 1983) (citing Anderson v. State, 362 So. 2d 1296, 1296 (Ala. Crim. App. 1978)).
[49] *Patton*, 21 So. 2d at 845–46 (citing Lee v. State, 20 So. 2d 471, 472 (Ala. 1944)).
[50] *Lee*, 20 So. 2d at 472 (citing Jackson v. State, 16 So. 523, 524 (Ala. 1894)).
[51] ALA. R. CRIM. P. 9.1(a).
[52] ALA. R. CRIM. P. 9.1(b)(1)(i).
[53] *Id.*

voluntarily waived his right to appear.[54] However, Alabama created an exception for incarcerated defendants, and a defendant who is in confinement does not have to be present when applying or arguing to change the place of his trial.[55] Alabama Rule of Criminal Procedure 10.1(d) also creates an exception to requirements that the defendant be present, thus an incarcerated defendant can remain protected when in fear for his safety appearing in open court.[56]

D. Change of Venue by the Court's Own Motion

Alabama law allows for the trial court to make an independent order to change venue. Section 15-2-21 of the Code allows the court to order *sua sponte* to change the place of the trial, pursuant to the criteria of section 15-2-20, if the trial judge feels a safe trial cannot be held in the county of the offense.[57] In *Ex parte Lancaster*, the court held that a change of venue can only be made on application of the defendant, but section 15-2-21 seemingly overrules that holding.[58] This power for the trial court comes with a caveat in that the trial court's decision must be made "with the consent of the defendant."[59] The Alabama Supreme Court has said, "The right to be tried in the place where the offense occurred is a substantial constitutional right."[60] Thus, if the defendant objects to the trial court's change of venue, the defendant suffers actual prejudice, and the court's decision would be reversible error.[61] Accordingly, while the trial judge has the power to move the trial on his own for safety reasons, the defendant's right to have the trial in the county of the offense supersedes the court's power.

E. Where to Move the Trial

The Code provides some guidance as to where the trial court may move venue. The Code of Alabama states, "When a change of venue is authorized, the trial must be removed to the nearest coun-

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[54] ALA. R. CRIM. P. 9.1(b)(1)(ii).
[55] ALA. CODE § 15-2-20(c) (LexisNexis 2011); ALA. R. CRIM. P. 10.1(d).
[56] ALA. R. CRIM. P. 10.1 cmt.
[57] ALA. CODE § 15-2-21 (LexisNexis 2011).
[58] *Compare id.*, *with Ex parte* Lancaster, 89 So. 721, 724 (Ala. 1921) ("No change of venue can be granted by a court in a criminal case, except on application, petition, or motion of the defendant.").
[59] § 15-2-21.
[60] *Ex parte* Longmire, 584 So. 2d 503, 505 (Ala. 1991).
[61] *See id.*

ty free from exception . . . ."[62] The trial court will determine the nearest appropriate county that is "free from obstacles to a fair and impartial trial."[63] A court will not accept the defendant's contention that a county is free from exception, and the defendant must provide evidence for the trial record to indicate that a particular county is not suitable.[64] While the location of the trial must be fair to the defendant, the venue must also provide a fair and impartial jury for the State.[65] When faced with this decision, case law indicates trial courts generally appear to have two avenues: (1) the trial court may reach its own decision as to where to hold the trial, based on the evidence presented by the prosecution and the defense;[66] or (2) the trial court may remove the case to a county where both the prosecution and defense agree.[67] However, even if the parties agree as to a venue, the trial court has the final say as to the propriety of the transferee venue.[68]

The Alabama Supreme Court has held that moving a trial from one division or courthouse within a county does not necessarily equate to change of venue.[69] Some counties in Alabama, such as Jefferson County and St. Clair County, are divided into multiple divisions that separate the caseloads of the court systems within those counties.[70] In *Ex parte Longmire*, the Alabama Supreme Court addressed a situation where a defendant was charged with a crime

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[62] ALA. CODE § 15-2-24 (LexisNexis 2011); *see also* ALA. R. CRIM. P. 10.1(a) ("[D]efendant shall be entitled to a change of the place of trial to the nearest county free from prejudice . . . .").

[63] *Ex parte* Hodges, 59 Ala. 305, 305 (1877).

[64] *See* Hoomes v. State, 37 So. 2d 686, 687 (Ala. Ct. App. 1948) (noting a lack of proof in record to substantiate an exception to the venue chosen by the court).

[65] *See Ex parte Hodges*, 59 Ala. at 305 ("It concerns the public of the State as well as individuals that all prosecutions shall be fair and impartial without injustice or prejudice to either party.").

[66] *See Ex parte* Fowler, 574 So. 2d 745, 746 (Ala. 1990) (defendant objected to trial court's choice of county where trial was removed); Bryan v. State, 43 Ala. 321, 322–23 (1869) (while parties agreed that Montgomery County was the closest county, the State suggested removal to Autauga County and the trial court removed the case to Autauga County); Hall v. State, 820 So. 2d 113, 120, 122 (Ala. Crim. App. 1999) (trial court removed case based on presented factors and defendant moved for a second change of venue); Hines v. State, 384 So. 2d 1171, 1183 (Ala. Crim. App. 1980) (changing counties based on demonstrations by local racist hate groups); *Hoomes*, 37 So. 2d at 687 (defendant excepted to the trial court's chosen county for trial).

[67] *See, e.g.*, *Ex parte* Lancaster, 89 So. 721, 721–22 (Ala. 1921) (prosecution does not contest change of venue to another county).

[68] *See Ex parte Hodges*, 59 Ala. at 305 ("It is left to the judge to whom the application is made to decide what is the nearest county free from such an exception.").

[69] *See Ex parte* Longmire, 584 So. 2d 503, 505–06 (Ala. 1991).

[70] *Id.* at 504.

in the Ashville Division of St. Clair County, and the jury was struck from a venire called in Ashville.[71] However, the trial was moved to the Pell City courthouse to expedite the proceedings.[72] The defendant claimed that this constituted a change of venue to which he did not consent, and that his conviction should be reversed.[73]

While recognizing that if such a transfer was considered a change of venue that the defendant was entitled to a reversal, the Alabama Supreme Court held that the transfer was not a change of venue because the two judicial divisions in St. Clair County were "not the equivalent of two counties for purposes of venue."[74] The court reached this decision by looking to the statutes creating the judicial divisions in both Jefferson and St. Clair Counties.[75] The legislation creating the judicial divisions within Jefferson County provided that each of the divisions had *exclusive* jurisdiction over the cases arising in each division, thus a transfer between those divisions would be similar to a change of venue between counties.[76] However, because the statute creating the Pell City and Ashville divisions within St. Clair County did not contain the "exclusive jurisdiction" language, a transfer between the divisions was not a change of venue similar to moving from one county to another, and the two divisions were really just parts of one court.[77] The holding of *Ex parte Longmire* seemingly provides a limited option to trial courts in counties with multiple divisions without exclusive jurisdiction to move a trial in an attempt to abate any adverse effects on a trial. However, this option will be limited by the statute creating the divisions within the county.

G. Restrictions on Change of Venue

1. State Cannot Move to Change Place of Trial

The language of the Code and Rule 10.1 clearly states that the *defendant* may make a motion to change the place of his trial.[78] Alabama courts have strictly held that the State, as the prosecution,

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 505.
[75] *Ex parte Longmire*, 584 So. 2d at 504.
[76] *See id.* at 504 (citing Agee v. State, 465 So. 2d 1196, 1204 (Ala. Crim. App. 1984)).
[77] *Id.* at 505–06.
[78] ALA. CODE § 15-2-20(a) (LexisNexis 2011); ALA. R. CRIM. P. 10.1(a).

cannot move to change venue of the trial.[79] Furthermore, in *Ex parte Lancaster*, the Alabama Supreme Court held that the State cannot dismiss a transferred case and then re–indict the defendant as a subterfuge to transfer venue back to the original county.[80]

2. Venue Can be Changed Only Once

Generally, venue for a criminal case can be moved only one time. The plain language of the Code states that the trial court can only transfer the case once.[81] *Ex parte Lancaster* also addressed this issue and followed previous precedent that once the trial has been removed, neither the defendant nor the State may seek to have venue changed again.[82] Moreover, once the trial has been removed, even if the State dismisses the charges and re–indicts the defendant in the original county, the new indictment will then be forwarded to the clerk of the transferee county.[83]

While section 15-2-24 states a court can change venue only once, a constitutional exception exists. In *Hines v. State*, the Alabama Court of Criminal Appeals recognized that where a criminal defendant cannot receive a fair trial with an impartial jury in the transferee county, constitutional guarantees require that the trial court change venue a second time.[84] The *Hines* court reviewed a situation where the defendant, a black man accused of raping a white woman, moved to have his trial removed from Morgan County, Alabama, to Cullman County in light of racially-charged prejudice, and the trial court granted the removal.[85] While the reviewing court reversed the verdict on grounds that the defendant's confession was inadmissible,[86] the court also stated that if on remand the trial court found that circumstances in Cullman County were so prejudiced as to justify a change of venue, constitutional rights to a fair trial outweighed the limitations on movement of the trial under section 15-2-24.[87] Thus, a single removal appears to be the general rule, but extreme circumstances may permit additional trans-

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[79] *Ex parte* Lancaster, 89 So. 721, 724 (Ala. 1921) ("Neither the Constitution nor the statutes of Alabama authorize the state to apply for or to secure a change of venue in any criminal case.").
[80] *Id.* at 724–25.
[81] ALA. CODE § 15-2-24 (LexisNexis 2011).
[82] *Ex parte Lancaster*, 89 So. at 724.
[83] *Id.* at 725.
[84] *See* Hines v. State, 384 So. 2d 1171, 1184 (Ala. Crim. App. 1980).
[85] *Id.* at 1172, 1183.
[86] *Id.* at 1181.
[87] *Id.* at 1184.

fer if the transferee venue proves to be so prejudiced as to deny the criminal defendant a fair trial.

3. Cannot Change Venue for Grand Jury

Court decisions reviewing Alabama law indicate a defendant cannot move to change venue of a grand jury overseeing his indictment. As previously stated, venue for an offense originates in the county where the offense was committed.[88] The grand jurors will be drawn from the county of the offense.[89] Additionally, the Code defines an indictment as "an accusation in writing presented by the grand jury of the county, charging a person with an indictable offense."[90] In reviewing Alabama statutes, the court in *Ex parte Lancaster* held, "There may be a change of venue for [a defendant's] trial, but there can be no change of venue for a grand jury to investigate and return a true bill."[91] If the defendant wishes to challenge the grand jury proceedings, his recourse is to move to have the indictment dismissed.[92]

III. PREJUDICE AFFECTING TRIAL

While the statutes and court decisions have specifically addressed issues of mob violence and threats of danger to the defendant,[93] many cases revolve around prejudice of jurors, especially prejudice from news and media reports.[94] Alabama courts have recognized two categories of prejudice in regards to pretrial publicity: actual prejudice and presumptive prejudice.[95] A criminal defendant shows actual prejudice by proving that jurors who decided

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[88] ALA. CODE § 15-2-2 (LexisNexis 2011).

[89] *See id.* § 12-16-57, -58, -70 (discussing procedures for creating jury pools in Alabama counties); *see also* ALA. R. CRIM. P. 12.1 (jurors to be drawn according to Chapter 16 of Title 12 of the Code).

[90] ALA. CODE § 15-8-1 (LexisNexis 2011); *see also* ALA. R. CRIM. P. 12.3(c)(1) (grand jury has power to hear indictable offenses committed within the county).

[91] *Ex parte* Lancaster, 89 So. 721, 722 (Ala. 1921).

[92] ALA. R. CRIM. P. 12.9(a). A challenge to the proceedings may regard the method of drawing one or more of the grand jurors or the qualifications of one or more of the grand jurors. *See* ALA. R. CRIM. P. 12.9 cmt.

[93] *See* ALA. CODE § 15-2-21 (LexisNexis 2011) (judge can move trial in the interest of avoid mob violence); *see also* Cherry v. State, 933 So. 2d 377, 386 (Ala. Crim. App. 2004) (discussing potential jurors' expressed concern of mob violence).

[94] *See Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *3–5 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014); *Ex parte* Fowler, 574 So. 2d 745, 746 (Ala. 1990); Godau v. State, 60 So. 908, 909 (Ala. 1913); Nelson v. State, 440 So. 2d 1130, 1131 (Ala. Crim. App. 1983).

[95] *E.g.*, Hunt v. State, 642 So. 2d 999, 1042–43 (Ala. Crim. App. 1993).

his case demonstrated a fixed opinion as to guilt prior to the trial and were unable to reach a verdict based on evidence presented at trial.[96] Alternatively, a defendant proves presumed prejudice "'when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.'"[97] A review of decisions shows that these standards impose a heavy burden on the defendant seeking a change of venue, but the courts have provided guidance in determining whether pretrial publicity has made the actual trial nothing "but a hollow formality."[98]

A. Actual Prejudice

In regard to pretrial publicity, the actual prejudice standard means what the name simply states: the defendant shows that a juror who *actually decided* the defendant's guilt was so influenced by media reports and public opinion that the juror was unable to reach a verdict based on the merits of the case.[99] Alabama courts have followed a two-part test in finding actual prejudice:

> To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid aside these preformed opinions and "render[ed] a verdict based on the evidence presented in court."[100]

This standard does not necessarily look to how widespread or inflammatory the media attention given to a particular case or defendant is, but rather the court will look for a nexus between any pretrial publicity and the existence of prejudice on the part of actual jury members.[101]

Part of the process in showing actual prejudice is to rely on the voir dire responses of venire members regarding the effects of pretrial publicity.[102] Often, individual voir dire, typically left to the discretion of the trial judge, is necessary in order to determine the full

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[96] *Id.* at 1043.
[97] *Id.* (emphasis omitted) (quoting Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)).
[98] Rideau v. Louisiana, 373 U.S. 723, 726–27 (1963) (discussing the effects of media generated jury bias on due process rights).
[99] *Hunt*, 642 So. 2d at 1043.
[100] *Id.* (citations omitted).
[101] Anderson v. State, 362 So. 2d 1296, 1300 (Ala. Crim. App. 1978) (citing McWilliams v. United States, 394 F.2d 41, 44 (8th Cir. 1968)).
[102] *Id.* at 1299.

extent of actual prejudice.[103] As an additional part of jury selection, attorneys may use juror questionnaires when screening jurors.[104] Furthermore, "[a] claim of actual prejudicial pretrial publicity requires an initial showing that at least one of the jurors who heard the case entertained an opinion that the defendant was guilty before hearing the evidence."[105] In using the voir dire and jury selection process, a criminal defendant must keep in mind that a juror's revelation of a preconceived idea of the defendant's guilt, alone, is not enough to show actual prejudice. If the court determines that the juror is capable of setting aside this preformed opinion and to reach a verdict based on the evidence, then the defendant has not necessarily suffered actual prejudice; and the court has not committed reversible error for failing to remove the juror or failing to move the trial to another venue.[106]

This author's review of the cases surrounding change of venue, including cases where defendants claimed actual prejudice, fails to produce a reported case where the court reversed a conviction based on actual prejudice. While initially such a finding may seem suspicious, further consideration of the requirements to prove actual prejudice sheds light on the rarity of actual prejudice being present. Given that the responses of prospective jurors during voir dire are generally the primary, if not the only, method of detecting juror prejudice based on pretrial publicity,[107] the notion that jurors might admit in an open court room that they believe the defendant is guilty and cannot try the case based on the evidence admitted at trial is far-fetched. Equally difficult to imagine is a trial judge—whether in the interest of justice or in fear of appellate review—allowing an openly prejudiced juror to sit in judgment on a petit jury. Thus, while the test for actual prejudice appears to set a high burden for the criminal defendant, the low frequency (or possible nonexistence) of reversals of verdicts on grounds of denials of mo-

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[103] *See Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *8, *10, *14 (Ala. Mar. 14, 2014) (citing *Ex parte* Anderson, 602 So. 2d 898, 899 (Ala. 1992)) (noting that while some parties may prefer individual voir dire, the use of this means is discretionary to the trial court), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014).

[104] *See id.* at *8 (discussing use of jury questionnaires prior to trial).

[105] Sale v. State, 8 So. 3d 330, 342 (Ala. Crim. App. 2008) (citing Jones v. State, 43 So. 3d 1258, 1268 (Ala. Crim. App. 2007)).

[106] *See* Godau v. State, 60 So. 908, 911–12 (Ala. 1913) (reviewing court found no error when trial judge failed to remove jurors who indicated they had a fixed opinion but gave assurances they could fairly and impartially try the case).

[107] *See* Anderson v. State, 362 So. 2d 1296, 1300 (Ala. Crim. App. 1978) (discussing juror prejudice based upon pre-trial publicity and the use of voir dire in the jury selection process).

tions to change venue based on actual prejudice is likely based on the reasonable assumption that instances of jurors admitting to fixed prejudice and trial judges allowing openly prejudiced jurors to serve on petit juries are rare.

Despite the seeming lack of reversals based on denial of change of venue resulting from actual prejudice from pretrial publicity, appellate courts have still addressed the issue. As discussed above, voir dire is the primary means of determining prejudice;[108] and at times individual voir dire can assist in better determining the prejudicial effects of pretrial publicity on potential jurors.[109] Alabama law does not require the trial court to permit individual voir dire when requested, even in capital cases.[110] The decision to allow individual voir dire is left to the discretion of the trial court, and the appellate courts grant leniency to trial courts in making the determination regarding the necessity of individual voir dire.[111] Despite this discretion, courts have recognized that, in certain cases, individual voir dire may be necessary to uncover all prejudice and to protect a criminal defendant's due process rights.[112] The Alabama Supreme Court has upheld the practice of questioning the venire in panels to determine if individuals have prior knowledge of the case and then allowing individual voir dire of the venire that replied in the affirmative.[113]

Recently, in *Ex parte State*, the Alabama Supreme Court held that the trial court has a great amount of discretion in determining the existence of actual prejudice, including denying the use of individual voir dire.[114] The court addressed the issue of "whether the trial court erred by accepting without individual voir dire, the assurances of the seated jurors that they could put aside what they

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[108] *See id.*

[109] *See Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, *8 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014).

[110] Taylor v. State, 666 So. 2d 36, 66 (Ala. Crim. App. 1994) (citing Coral v. State, 628 So. 2d 954, 968 (Ala. Crim. App. 1992); Smith v. State, 588 So. 2d 561, 579 (Ala. Crim. App. 1991)). *See generally Ex parte State*, 2014 WL 983288, at *8–14 (discussing individual voir dire and finding that individual voir dire is not always required in a capital murder case).

[111] *See Ex parte State*, 2014 WL 893288, at *10 (citing *Ex parte* Anderson, 602 So. 2d 898, 899 (Ala. 1992)).

[112] Haney v. State, 603 So. 2d 368, 402 (Ala. Crim. App. 1991) (citing United States v. Hurley, 746 F.2d 725, 727 (11th Cir. 1984); Waldrop v. State, 462 So. 2d 1021, 1026 (Ala. Crim. App. 1984)); *see* United States v. Hawkins, 658 F.2d 279, 284–86 (5th Cir. Unit A Sept. 1981).

[113] Broadnax v. State, 825, So. 2d 134, 161–62 (Ala. Crim. App. 2000).

[114] *Ex parte State*, 2014 WL 983288, at *14.

had read or heard and render a fair verdict based on the evidence."[115] The trial involved a man convicted of the capital murders of his children in Mobile County, and the Alabama Court of Criminal Appeals reversed the conviction, holding that the trial court abused its discretion in not permitting individual voir dire to ascertain the existence of actual prejudice.[116] The Court of Criminal Appeals held that denying individual voir dire in a case that had drawn so much publicity and community reaction precluded even the ability to determine actual prejudice.[117] The court believed that the nature of the defendant's trial was such that generalized questions to the venire were insufficient to determine prejudice.[118]

The Alabama Supreme Court disagreed, utilizing *Ex parte Brown*[119] and *Mu'Min v. Virginia*[120] to find that the trial court had not abused its discretion in denying the defendant the use of individual voir dire in jury selection.[121] The court held, "Individual voir dire is required only when there is an indication that the assurances of the seated jurors that they could put aside what they had read or heard and render a fair verdict based on the evidence are not genuine."[122] In reaching the decision to uphold to trial court's decision to deny individual voir dire, the Alabama Supreme Court noted that "the trial court was acutely aware of the pretrial publicity, the local reaction to the crime, [the defendant's] reputation, and the alleged community prejudice."[123] The court found that the trial judge showed concern about the possibility of bias and upheld the trial court's decision based on the judge's consideration of jury questionnaires, the judge's review of the responses (or nonresponses) to oral questions asked of the venire, and the judge's repeated advisements "to the venire of the need for candor."[124]

Some courts have also looked to statistical analysis in reviewing claims of actual prejudice. In *Callahan v. State*, the Court of Crimi-

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[115] *Id.*
[116] *Id.* at *1; Luong v. State, CR-08-1219, 2013 WL 598119, at *1, *22–24, *38 (Ala. Crim. App. Feb. 15, 2013).
[117] *Luong*, 2013 WL 598119, at *22–24.
[118] *Id.* at *22–24 (citing Cummings v. Dugger, 862 F.2d 1504, 1507–08 (11th Cir. 1989)); *see also* United States v. Hawkins, 658 F.2d 279, 285 (5th Cir. Unit A Sept. 1981)).
[119] 632 So. 2d 14 (Ala. 1992).
[120] 500 U.S. 415 (1991).
[121] *Ex parte State*, 2014 WL 983288, at *14.
[122] *Id.*
[123] *Id.*
[124] *Id.*

nal Appeals reviewed the defendant's claim of actual prejudice.[125] While the standard is slightly different from the two-part test announced in *Hunt*,[126] the analysis is still persuasive. The defendant, Callahan, claimed that actual prejudice existed because ten of the eighty-eight prospective jurors indicated during voir dire that they had the opinion or impression that Callahan was guilty.[127] The *Callahan* court looked to the United States Supreme Court decision in *Murphy v. Florida*, where twenty of seventy-eight prospective jurors were dismissed for claiming to have an opinion as to the defendant's guilt.[128] However, the Court stated that a small percentage (25.6%) of potential jurors had an opinion, and the *Callahan* court compared the Court's findings to the twelve potential jurors (13.6%) that were dismissed during voir dire prior to Callahan's trial.[129] The *Callahan* court reasoned that where the *Murphy* court did not find actual prejudice with a higher percentage of potential jurors admitting a preformed opinion of guilt than in the instant case, Callahan had not carried his burden in proving actual prejudice.[130]

A subtle difference seems present in *Callahan*, as compared to other cases such as *Hunt*, in the formulation and analysis of the standard for actual prejudice. *Hunt* used a two-part test in looking at whether jurors who decided the case had a preformed opinion of the defendant's guilt and whether the jurors indicated they were unable to set aside that opinion to decide the case based on the evidence.[131] In contrast, the *Callahan* court announced the standard for actual prejudice as "a connection between the publicity generated by . . . news articles, radio and television broadcasts and

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[125] Callahan v. State, 557 So. 2d 1292, 1306–07 (Ala. Crim. App. 1989). Prior to reviewing Callahan's claim, the court noted that Callahan's application for change of venue was procedurally barred because Callahan had not sworn to the application. *Id.* at 1306. The court also found Callahan's motion failed because Callahan presented no actual evidence of prejudice, only allegations. *Id.*

[126] *See supra* note 100, and accompanying text.

[127] *Callahan*, 557 So. 2d at 1307. While the court cites Callahan's brief as claiming ten prospective jurors claimed to have opinions of Callahan's guilt, the court's review of the record indicated that Callahan successfully challenged twelve potential jurors for this reason. *Id.*

[128] *Id.* (citing Murphy v. Florida, 421 U.S. 794, 803 (1975)).

[129] *Id.* (citing *Murphy*, 421 U.S. at 803).

[130] *Id.*

[131] Hunt v. State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993). While the defendant, Hunt, did not claim actual prejudice, the court still presented the language of this standard in regards to actual prejudice. *Id.* Courts following *Hunt* have adopted this standard. *See, e.g.*, Cherry v. State, 933 So. 2d 377, 386 (Ala. Crim. App. 2004) (citing Blanton v. State, 886 So. 2d 850, 879 (Ala. Crim. App. 2003)).

the existence of actual jury prejudice."[132] While the language of the standards seems similar, the distinction lies within the analyses of the cases. The *Hunt* standard seems to look at whether "jurors who decided the case" had fixed opinions against the defendant, presenting a view that reviewing courts should look to the actual *sitting jurors*.[133] In contrast, the statistical analysis in *Callahan* indicates that actual prejudice also looks at ratios of *potential* jurors.[134] Thus, *Callahan* seems to imply that courts can infer actual prejudice based on statistical analysis of the responses of potential jurors.[135] Though these cases appear to have slightly different standards, practitioners likely are safer in relying on the *Hunt* standard given that *Hunt* has been decided more recently than *Callahan*,[136] *Hunt*'s language has been cited approvingly by the courts within recent years,[137] and *Hunt*'s language has foundations from the Eleventh Circuit Court of Appeals.[138] Furthermore, despite *Callahan*'s reliance on *Murphy v. Florida*, the Court's analysis in *Murphy* regarding actual prejudice arguably focused on sitting jurors and statistical analysis of whether certain venire members' prior exposure to the facts and circumstances of the case could raise an inference of prejudice among other members of the venire.[139] Ultimately, in comparison, *Hunt*'s

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[132] *Callahan*, 557 So. 2d at 1306 (internal quotation marks omitted) (citing Nelson v. State, 440 So. 2d 1130, 1131–32 (Ala. Crim. App. 1983)).

[133] *See Hunt*, 642 So. 2d at 1043.

[134] *See Callahan*, 557 So. 2d at 1307.

[135] *See generally id.* (discussing statistical analysis of venire in reviewing actual prejudice).

[136] *Hunt* was decided in 1993. *Hunt*, 642 So. 2d at 999. *Callahan* was decided in 1989. *Callahan*, 557 So. 2d at 1292.

[137] *See* Scott v. State, CR-08-1747, 2012 WL 4757901, at *10 (Ala. Crim. App. Oct. 5, 2012) (quoting *Hunt* and the two-part test in finding no actual prejudice); Cherry v. State, 933 So. 2d 377, 386 (Ala. Crim. App. 2004) (court reviewing claim of actual prejudice by one of the men convicted in the infamous Birmingham Sixteenth Street church bombing adopted the two-part test advanced in *Hunt*); *see also* Johnson v. State, CR-10-1606, 2014 WL 2061147, at *41–42 (Ala. Crim. App. May 20, 2014) (quoting *Scott*, 2012 WL 4757901, at *10); Campbell v. State, 718 So. 2d 123, 133 (Ala. Crim. App. 1997) (while not quoting *Hunt*'s two-part test, the opinion's analysis focuses on fact that no evidence was presented that sitting jurors expressed fixed opinions as to the defendant's guilt). In *Sale v. State*, the Court of Criminal Appeals cited *Hunt*'s language and also held that proof of initial prejudice requires an initial showing that a sitting juror held an opinion prior to the trial. Sale v. State, 8 So. 3d 330, 342 (Ala. Crim. App. 2008).

[138] *Hunt*, 642 So. 2d at 1043 (citing Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983)).

[139] *See* Murphy v. Florida, 421 U.S. 794, 800–03 (1975). "The voir dire in this case indicates no such hostility to petitioner by the *jurors who served in his trial* as to suggest a partiality that could not be laid aside." *Id.* at 800 (emphasis added). The analysis of the proportion of the venire members who admitted to some fixed

two-part test provides a more practical analytical tool for defendants, lawyers, and courts to reference in arguing and resolving issues of actual prejudice in Alabama.

A few concerns arise when considering voir dire of jurors: What extrajudicial knowledge of the case rises to a level of being prejudicial? Does having an opinion about the defendant prior to trial prove *per se* actual prejudice? Can a presumption that a juror is biased be overcome or remediated? In regards to claims of actual prejudice, defendants often claim or raise issues regarding jurors or venire members making comments during voir dire that pretrial publicity, information they heard about the defendant's case prior to trial, or other matters possibly affected the jurors ability to decide the case fairly and impartially.[140] Several courts have held that a mere opinion as to a defendant's guilt or simple exposure to publicity of the case, alone, is insufficient for a showing of actual prejudice.[141] Where a juror indicates prior knowledge of the defendant's case or some opinion as to the defendant's guilt, courts have found that prejudice is not present if the juror indicates that he can set aside the opinion and decide the case based on evidence.[142] However, the United States Supreme Court has held that if a review of the totality of the circumstances shows that a great number of jurors came into the trial with an opinion as to the defendant's guilt, a juror's contention that he can decide the trial fairly may carry little weight.[143] The inference of actual prejudice is especially strong when, despite the juror's claim that he can be impartial, the juror has also stated that the defendant would have to prove his innocence to the juror.[144]

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opinion seemingly focuses on whether any prejudice could have been imputed upon the sitting jurors. *Id.* at 803.

[140] *See* Lockhart v. State, CR-10-0854, 2013 WL 4710485, at *43 (Ala. Crim. App. Aug. 20, 2013); *Cherry*, 933 So. 2d at 386 (noting some venire members had concerns about mob violence and knew of protestors who had been arrested at nearby rallies); Nelson v. State, 440 So. 2d 1130, 1132 (Ala. Crim. App. 1983); *see also* Skilling v. United States, 561 U.S. 358, 386–89 (2010) (discussing claims of actual prejudice and review of responses to questionnaires).

[141] *See* Irvin v. Dowd, 366 U.S. 717, 722–23 (1961); Godau v. State, 60 So. 908, 911–12 (Ala. 1913); Anderson v. State, 362 So. 2d 1296, 1299 (Ala. Crim. App. 1978) (quoting *Murphy*, 421 U.S. at 799–800).

[142] *See Ex parte* Grayson, 479 So. 2d 76, 80 (Ala. 1985) (citing *Irvin*, 366 U.S. at 723); *Godau*, 60 So. at 911–12; *Cherry*, 933 So. 2d at 387.

[143] *Irvin*, 366 U.S. at 727–28 (finding that despite the jurors' presumably honest response that they could be fair, a review of the entire voir dire testimony raised concerns that prior opinions of the case would have a substantial psychological effect on the jurors).

[144] *Id.* at 728.

B. Presumed Prejudice

The other standard used in showing the prejudicial effects of pretrial publicity is the presumed or presumptive prejudice standard.[145] In the past, Alabama courts have traditionally held that "[f]or prejudice to be presumed . . . , the defendant must show: 1) that the pretrial publicity was prejudicial and inflammatory and 2) that the prejudicial pretrial publicity saturated the community where the trial was held."[146] However, a recent Alabama decision followed a slightly different four-part test in reviewing claims of presumed prejudice based on the United States Supreme Court decision *Skilling v. United States*.[147] Overall, trial courts must look to the totality of the facts and circumstances surrounding the trial in determining whether to presume prejudice.[148] Essentially, the presumed prejudice standard requires a trial court to review the surrounding facts and circumstances regarding the publicity of the trial and determine if the community is so overwhelmed with information regarding the trial and determine if holding the trial in the county would be so unfair as to make the defendant's trial a "hollow formality."[149] A review of the case law indicates that in contrast to the actual prejudice standard, which looks to the effect of publicity on jurors who decided the case, presumed prejudice looks at potential jurors on the venire and whether a court can assume that a significant number of jurors harbor some prejudicial feelings towards the defendant that would affect the jurors' ability to decide the case.

1. The Traditional Two-Part Test

Courts have noted that finding presumed prejudice is rare.[150] Under prior decisions, this rarity is likely due to the exacting requirements of the two-part test used for determining if presumed

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[145] *E.g.*, Blanton v. State, 886 So. 2d 850, 877 (Ala. Crim. App. 2003) (discussing the standard as either "presumptive prejudice" or "presumed prejudice").
[146] *Id.* (citing Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)).
[147] *See Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *3–6 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014). The Alabama Supreme Court and the Alabama Court of Criminal Appeals both applied the *Skilling* factors, however the Supreme Court reached a different result than the Court of Criminal Appeals. *See Ex parte State*, 2014 WL 983288, at *3–6; *Luong*, 2013 WL 598119, at *9–21.
[148] *E.g.*, *Blanton*, 886 So. 2d at 877 (citing *Coleman*, 778 F.2d at 1490).
[149] *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (discussing a highly publicized case where trial in the original county appeared to be a "hollow formality" and the defendant's guilt was decided prior to trial).
[150] *E.g.*, *Blanton*, 886 So. 2d at 877 (citing *Coleman*, 778 F.2d at 1490).

prejudice applies. First, in reviewing the content of the media reports, courts require that the publications or statements be inflammatory or sensational in nature.[151] As one court stated, "Newspaper articles alone would not necessitate a change of venue unless it was shown that the articles so affected the general citizenry through the insertion of such *sensational, accusational[,] or denunciatory statements*, that a fair and impartial trial was impossible."[152] Reports that provide objective, fact-laden accounts of the crime or case generally do not give rise to establishing a presumption of prejudice.[153] As the court in *Hunt v. State* stated, "'[p]ublicity' and 'prejudice' are not the same thing. Excess publicity does not automatically or necessarily mean that the publicity was prejudicial."[154] Courts will look to see if the publicity "was calculated to . . . mold public opinion," necessitating a change of venue.[155]

Based on this precedent, courts would likely find that a statement in an article from a local beat reporter stating that the defendant is charged with a capital crime in which the prosecution is seeking the death penalty is not a prejudicial statement because the report is merely stating the facts of the case. However, if an editorial in a local newspaper made a sensational or inflammatory statement that the accused defendant is guilty and should be executed, then such a statement could serve as compelling evidence to the first prong of the test to determine presumed prejudice.

Even if the first prong of the test regarding the sensationalism of the content of the statements is satisfied, defendants still have to prove that the publicity is widespread and has saturated the community.[156] The amount of the publicity necessary to satisfy the second prong of the test must be such that the publicity has been so engrained into a community that the media coverage "renders the

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[151] Cherry v. State, 933 So. 2d 377, 385 (Ala. Crim. App. 2004) (citing United States v. Angiulo, 896 F.2d 1169, 1181 (1st Cir. 1990)).

[152] McLaren v. State, 353 So. 2d 24, 31 (Ala. Crim. App. 1977) (emphasis added) (citing Patton v. State, 21 So. 2d 844, 846 (Ala. 1945)).

[153] *See* Hunt v. State, 642 So. 2d 999, 1044 (Ala. Crim. App. 1993) (finding change of venue was not necessary in felony trial of former governor when offered media reports were factual in nature, describing the charges and the pretrial processes).

[154] *Id.* at 1043.

[155] *Patton*, 21 So. 2d at 846.

[156] *See Hunt*, 642 So. 2d at 1043.

trial setting 'inherently suspect.'"[157] One lone inflammatory article will not be sufficient to make the requisite showing of saturation.[158]

Courts have reviewed the saturation of publicity by different means. Some courts have reviewed the circulation of newspapers or the broadcast audience of television stations.[159] When reviewing broadcast audiences and circulation areas, courts also factor in the size and characteristics of the community's population, such as whether the community is a large metropolitan area or a small rural community.[160] A few courts have reviewed polling evidence introduced by the defendant to indicate the amount of publicity a defendant's case received and the effect the publicity had on the community.[161] Some courts have also looked to questionnaires given to potential jurors as part of the jury selection process.[162] Despite the popular use of questionnaires, though, the defendant is not entitled to the use of jury questionnaires.[163] In years past, courts have even accepted witness testimony and affidavits regarding the pervasiveness of prejudicial publicity;[164] however, reviews of more recent cases indicate courts have not consistently relied on this evi-

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[157] Nelson v. State, 440 So. 2d 1130, 1131 (Ala. Crim. App. 1983) (citing McWilliams v. United States, 394 F.2d 41, 44 (8th Cir. 1968)). The defendant must show that "a 'pattern of deep and bitter prejudice' [exists] in the community." *Id.* (citing Irvin v. Dowd, 366 U.S. 717, 727 (1961)).

[158] *See* Thomas v. State, 539 So. 2d 375, 393 (Ala. Crim. App. 1988).

[159] *See* Rideau v. Louisiana, 373 U.S. 723, 724 (1963) (citing the numbers of community residents who watched a defendant's confession to police on television news report); Mayola v. Alabama, 623 F.2d 992, 998 (5th Cir. 1980) (citing United States v. Ricardo, 619 F.2d 1124, 1131–32 (5th Cir. 1980)) (noting that failure to present circulation statistics of news publications can weigh against defendant arguing for change of venue); *Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *5 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014) (discussing the defendant's argument for changing venue and noting the circulation of a newspaper in Mobile, Alabama).

[160] *See* Mathis v. State, 296 So. 2d 755, 759 (Ala. Crim. App. 1973) (discussing effects of publicity on the metropolitan area of Mobile and Baldwin Counties).

[161] *See* Scott v. State, CR-08-1747, 2012 WL 4757901, at *9 (Ala. Crim. App. Oct. 5, 2012); Cherry v. State, 933 So. 2d 377, 385–86 (Ala. Crim. App. 2004) (citing Blanton v. State, 886 So. 2d 850, 877–79 (Ala. Crim. App. 2003)) (telephone polling statistics from Jefferson County, Alabama, introduced in an effort to prove presumed prejudice against two defendants in 1963 Birmingham church bombing case); *see also* Samra v. State, 771 So. 2d 1108, 1115 (Ala. Crim. App. 1999) (also discussing polling data). Bobby Frank Cherry and Thomas Edward Blanton were codefendants in the bombing. *Cherry*, 933 So. 2d. at 379.

[162] *E.g.*, *Scott*, 2012 WL 4757901, at *11.

[163] *E.g.*, McCray v. State, 88 So. 3d 1, 81 (Ala. Crim. App. 2010).

[164] *See* Godau v. State, 60 So. 908, 909 (Ala. 1913); Beddow v. State, 96 So. 2d 175, 176 (Ala. Crim. App. 1956).

dence.[165] The subjective nature of such statements and that they typically offer more opinion than fact seem to cause the disfavor the use of opinion testimony and affidavits.[166]

In addressing presumed prejudice, defendants and attorneys, as well as judges, must also be cognizant of what questions to address during voir dire. As a preliminary matter, courts generally want to address whether potential jurors, even in group voir dire, have any outside knowledge of the case or the parties involved in the case.[167] Courts have initially asked whether any potential jurors have outside knowledge, then the courts may ask those individual potential jurors follow-up questions to determine the person's ability to be fair.[168] Trial courts typically seek to find what potential jurors have heard about the case, whether the potential jurors have formed an opinion about the defendant's guilt, and whether the jurors can set aside that opinion to judge the case on the evidence.[169] Courts may also inquire about latent bias that could affect a juror's feeling towards the defendant.[170] Trial courts have discretion over voir dire, and the courts can limit voir dire to topics and questions which are relevant to exposing bias or allow attorneys to determine when to use strikes.[171]

While individual voir dire may be preferable, or even necessary, in some situations,[172] trial courts may conduct voir dire in

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[165] *See* McLaren v. State, 353 So. 2d 24, 32 (Ala. Crim. App. 1977) (court rejected argument of presumed prejudice even after attorney presented affidavit that indicated members of the community believed the defendant was guilty prior to trial). This author's research has not found any notable cases that give significant weight to affidavits or testimony of community members that discuss an opinion of whether the defendant can receive a fair trial.

[166] *See Godau*, 60 So. at 910–11 (discussing how both defendants and prosecutors can present testimony and affidavits of individuals expressing *opinions* that defendant may or may not receive a fair trial, but trial judges must look to the facts).

[167] *See generally Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *9 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014) (transcript of trial court's voir dire to a panel of potential jurors).

[168] *See id.* at *9.

[169] *See* Patton v. Yount, 467 U.S. 1025, 1029 (1984); *Ex parte State*, 2014 WL 983288, at *9; Samra v. State, 771 So. 2d 1108, 1116 (Ala. Crim. App. 1999). *But see* Mu'Min v. Virginia, 500 U.S. 415, 431–32 (holding that individual questioning regarding content of news reports is not required under the Due Process Clause).

[170] *See* Skilling v. United States, 561 U.S. 358, 376 (2010) (noting that the trial court conducted further voir dire in case of Enron defendant when potential juror expressed negative views towards "corporate greed").

[171] ALA. R. CRIM. P. 18.4(c)–(d).

[172] *See* Haney v. State, 603 So. 2d 368, 402 (Ala. Crim. App. 1991) (citing United States v. Hurley, 746 F.2d 725, 727 (11th Cir. 1984)) ("Individual questioning may

groups where the trial judge makes a reasonable effort to determine the effects of publicity on the individual venire members.[173] Whether to grant individual voir dire is discretionary to the court and depends on the particular facts of the individual case.[174] Part of the goal of individual voir dire is to ensure that the answers of one particular juror, especially regarding what that juror may know about the case, do not influence the other potential jurors as well as inhibit the potential jurors from answering questions.[175] Appellate courts have affirmed trial court decisions to conduct voir dire of a panel and refuse individual voir dire except where a particular juror indicates he has formed an opinion of the case.[176]

For all levels of courts, it seems that the benchmark case for reviewing change of venue based on presumed prejudice is *Rideau v. Louisiana*.[177] The defendant, Wilbert Rideau, was convicted of robbery, kidnapping, and murder in connection with the robbery of a bank in Lake Charles, Louisiana.[178] After Rideau's arrest, the Sheriff of Calcasieu Parish interviewed Rideau, and during the interview Rideau confessed to the crimes.[179] The interview was video recorded, and a local television station broadcast the interview for three consecutive days.[180] During voir dire, three of the actual jurors admitted they had seen Rideau's interview on television, and two other members of the jury were deputy sheriffs of Calcasieu Par-

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be necessary under some circumstances to ensure that all prejudice has been exposed.").

[173] *See Mu'Min*, 500 U.S. at 431–32 (finding that trial judges voir dire of jurors in groups of four and careful examination of jurors' responses regarding pretrial publicity did not violate due process); *Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *9 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014) (discussing the trial court's addressing individual members of venire while in panels). The court in *Ex parte State* partially relied on the reasoning of *Mu'Min* in reaching its decision. *Ex parte State*, 2014 WL 983288, at *14.

[174] *Ex parte State*, 2014 WL 983288, at *10 (citing *Ex parte* Anderson, 602 So. 2d 898, 899 (Ala. 1992)); Parker v. State, 587 So. 2d 1072, 1078 (Ala. Crim. App. 1991).

[175] *See generally* Ivery v. State, 686 So. 2d 495, 512–13 (Ala. Crim. App. 1996) (discussing questioning of potential jurors at the bench, not permitting potential jurors to disclose what they knew about the case from pretrial publicity, and finding that the group voir dire did not inhibit the jurors' responses).

[176] *See* Taylor v. State, 808 So. 2d 1148, 1183–84 (Ala. Crim. App. 2000).

[177] Rideau v. Louisiana, 373 U.S. 723 (1963); *see also Ex parte State*, 2014 WL 983288, at *7 (noting that *Rideau* is the "'seminal case'" when addressing presumed prejudice).

[178] *Rideau*, 373 U.S. at 723–25.

[179] *Id.* at 724.

[180] *Id.* The Court noted that the record did not indicate who prompted the broadcasting of the interview, but law enforcement actively participated and cooperated with the broadcast. *Id.* at 725.

ish.[181] The Supreme Court held that the trial court violated Rideau's due process rights by refusing to change venue "after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged."[182]

Because thousands of people within the community had been exposed to the televised interview, the Court reasoned that, in essence, Rideau had been tried in the eyes of the local citizens.[183] Furthermore, the Court found that any subsequent trial "in a community so pervasively exposed to such a spectacle could be but a hollow formality."[184] The Court recognized that state courts are generally allowed to regulate the proceedings within their courtrooms as they see fit, however, such a violation of due process rendered the trial setting in *Rideau* into a "kangaroo court."[185] Based on the repeated televising of the interview, the number of residents who viewed the interview, and the pervasiveness of the televised broadcasting of the confession, the Court reversed Rideau's conviction on grounds that the trial court should have changed venue.[186]

A contemporary example of a highly publicized case where a defendant sought change of venue based on prejudicial pretrial publicity in Alabama is *Woodward v. State*.[187] Mario Dion Woodward was tried and convicted of capital murder for the 2006 death of Officer Keith Houts of the Montgomery Police Department.[188] On appeal, Woodward argued that the trial court should have considered that the postings by readers on internet news stories regarding the crime "demonstrated pervasive, prejudicial publicity in Montgomery County that necessitated a change of venue."[189] Woodward argued that the trial court failed to consider the internet comments when considering the motion to change venue and ultimately erred in denying the motion.[190]

The Alabama Court of Criminal Appeals court found in the record that the trial court sufficiently considered the evidence

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[181] *Id.*
[182] *Id.* at 726.
[183] *Rideau*, 373 U.S. at 726. The Court stated that approximately 24,000 people watched the first broadcast, 53,000 saw the second broadcast, and approximately 20,000 saw the last broadcast. *Id.* at 724. The population of Calcasieu Parish was approximately 150,000 residents. *Id.*
[184] *Id.* at 726.
[185] *Id.*
[186] *See id.* at 726–27.
[187] 123 So. 3d 989, 1048 (Ala. Crim. App. 2011).
[188] *Id.* at 999.
[189] *Id.* at 1048–49.
[190] *Id.* at 1049.

when the trial court "knowledgeably commented on some of the posts, and clearly stated that it had read and considered Woodward's motion."[191] In regards to whether the trial court erred in denying the motion, the court found that Woodward failed to carry his burden in proving presumed prejudice.[192] The court acknowledged evidence indicating that many of the posts came from readers outside of Montgomery County, and that opinions expressed by those individuals clearly were not the opinions of the reporters or editors of the news sources.[193] Moreover, relying on the prior decision of *McMillan v. State*,[194] the reviewing court found that no evidence in the record indicated that the comments were widely read by Montgomery County citizens, were representations of fixed opinions that could not be set aside to decide the trial, and were not the type of communications that readers would commonly associate being "'news coverage' at all."[195] Finally, the court found that even the combination of online and print news coverage failed to meet the two-part review of inflammatory coverage and saturation of the community with prejudicial publicity and affirmed Woodward's conviction.[196]

Following *Woodward*, in the 2013 decision *Lockhart v. State*, the Alabama Court of Criminal Appeals found insufficient proof of presumed prejudice based on pretrial publicity to overturn a capital murder conviction.[197] A Lee County, Alabama, court tried and convicted Courtney Larrell Lockhart for the 2008 murder of Lauren Burk, a student at Auburn University.[198] Following his conviction, Lockhart appealed the trial court's denial of the motion to change venue on grounds of actual and presumed prejudice.[199] When reviewing the news articles presented as evidence, the Court of Criminal Appeals noted that "they were largely factual accounts and were not inherently prejudicial, inflammatory, or sensational."[200] Comments by readers were posted on some of the online news articles, and while some of the comments on those articles

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[191] *Id.*
[192] *Id.* at 1051.
[193] *Woodward*, 123 So. 3d at 1050.
[194] McMillan v. State, 139 So. 3d 184, 243–33 (Ala. Crim. App. 2010) (holding that unflattering comments made on internet blogs were insufficient to necessitate a change of venue).
[195] *Woodward*, 123 So. 3d at 1050–51.
[196] *Id.* at 1051, 1059.
[197] Lockhart v. State, CR-10-0854, 2013 WL 4710485, at *1, *45, *77 (Ala. Crim. App. Aug. 20, 2013).
[198] *Id.* at *1.
[199] *Id.* at *43.
[200] *Id.* at *45.

"might have been inflammatory[,]" the court held "those comments alone did not require a change of venue."[201] In addressing the publicity surrounding the case, the court relied in part on the prior holding of *Woodward v. State*, and ultimately found that Lockhart's case was not one of the rare cases in which a court presumes prejudice.[202]

2. The *Skilling* Factors

In 2010, the United States Supreme Court again addressed presumed prejudice in *Skilling v. United States*.[203] In *Skilling*, the Court reviewed an appeal by one of the defendants in the Enron scandal.[204] The Fifth Circuit Court of Appeals ruled that prejudice could be presumed from the pretrial publicity surrounding Skilling's case, however, the Fifth Circuit also held this was a rebuttable presumption that could be overcome with a thorough review of voir dire regarding the impaneled jury.[205] In reversing the Fifth Circuit, the Court looked to four factors[206] and found Skilling had not proven presumed prejudice.[207] The Court sided with the initial ruling of the district court and found no presumed prejudice was present and the denial of the motion to change venue "did not exceed constitutional limitations."[208]

Skilling argued that the Court need not actually review the jury selection process in order to find presumed prejudice, but the Court rejected this assertion and used four factors in reviewing claims of presumed prejudice.[209] The first factor the Court reviewed was the "size and characteristics of the community in which

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[201] *Id.*

[202] *Id.* (citing Woodward v. State, 123 So. 3d 989, 1051 (Ala. Crim. App. 2011)).

[203] *See generally* Skilling v. United States, 561 U.S. 358, 377–385 (2010) (discussing and ultimately finding no presumed prejudice).

[204] *Id.* at 377.

[205] *Id.* at 375–377(citing United States v. Skilling, 554 F.3d 529, 561–64 (5th Cir. 2009)).

[206] Some contend that the Court looked to six factors. Kristin R. Brown, Note, *Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality*, 19 TEX. WESLEYAN L. REV. 809, 833–34 (2013). However, the *Skilling* court, as has the Alabama Supreme Court, addressed only four factors, and the additional factors appear to be part of supplemental discussion. *See Skilling*, 561 U.S. at 382–85; *Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *4 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014). Ultimately, though, it appears that all of the described six factors contributed to the Court's decision in *Skilling*.

[207] *Skilling*, 561 U.S. at 381–84.

[208] *Id.* at 385.

[209] *Id.* at 381–84.

the crime occurred."[210] Looking to the ruling in *Rideau*, the Court held that larger metropolitan areas—such as Houston, Texas—typically provide a larger jury pool from which to draw, and courts should have less difficulty finding twelve impartial jurors.[211] Second, the Court looked to the content of the news reports regarding Skilling's trial.[212] While finding that the news stories "were not kind," the Court found the stories "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight."[213] Looking at the third factor, the time which had passed between the beginning of the Enron scandal and Skilling's trial, the Court found that the publicity regarding Skilling's trial subsided over a four year period leading up to the trial.[214] The final factor the Court addressed was the fact that Skilling's jury, while convicting him of nineteen counts of "the honest-services-fraud conspiracy charge," found him not guilty on nine counts of insider trading.[215] The *Skilling* court found this final factor to be the most significant indicator that Skilling was tried by fair jurors that were able to set aside what they may have heard in the news and try Skilling based on the evidence presented at trial.[216] In its analysis, the Court distinguished Skilling's case from others where courts had properly presumed prejudice because the publicity surrounding the case was not exceedingly vivid, the community's connections with Enron were not so great that a fair jury could not be empaneled, and the district court properly delayed the trial following one of Skilling's co-defendant's guilty plea.[217]

Alabama courts have started to look to the *Skilling* factors in reviewing claims of presumed prejudice.[218] In reviewing the conviction of Lam Luong, the Alabama Court of Criminal Appeals and the Alabama Supreme Court announced the factors as (1) the size and characteristics of the community; (2) the content of the media coverage; (3) the timing of the coverage; and (4) the media inter-

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[210] *Id.* at 382.
[211] *Id.*
[212] *Id.* at 382–83.
[213] *Skilling*, 561 U.S. at 382. The Court contrasted this situation with Rideau's televised confession. *Id.* at 382–83.
[214] *Id.* at 383.
[215] *Id.* at 359, 383.
[216] *Id.* at 383.
[217] *Id.* at 383–84.
[218] *See Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *3–8 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014); Luong v. State, CR-08-1219, 2013 WL 598119, at *9–21 (Ala. Crim. App. Feb. 15, 2013).

ference with the trial.[219] The Alabama Supreme Court, seemingly as a collateral consideration, considered the "'community's close involvement with the case.'"[220] Initially, in *Luong v. State*, the Court of Criminal Appeals reversed the defendant's conviction, finding that a review of the factors showed a presumption of prejudice.[221] However, the Alabama Supreme Court reversed the Court of Criminal Appeals decision by applying the *Skilling* factors and finding that the facts surrounding Luong's trial did not raise a presumption of prejudice.[222] While the Alabama Supreme Court's decision obviously stands as the current law regarding change of venue, a comparison between the cases is informative in showing the current state of how to review change of venue using the *Skilling* factors in Alabama.

The Alabama Supreme Court and the Court of Criminal Appeals both considered the size and characteristics of the community in Mobile County.[223] The population of Mobile County was over 400,000 residents, and both courts agreed that larger communities typically reduce the presumption of prejudice.[224] While the opinion by the Court of Criminal Appeals did not indicate a judgment on Mobile County's population size, the Supreme Court held that Mobile County was "large and diverse," and the Supreme Court was "reluctant to conclude that 12 impartial jurors could not be empaneled" when compared to populations analyzed in previous cases.[225]

A key factor where the courts differed was in the review of the content of the media coverage. The Court of Criminal Appeals reviewed and gave an account of fifty-nine articles Luong presented.[226] The intermediate court noted that many of the articles discussed Luong's past drug use, Luong's criminal history, and Luong's statements regarding his committing the murders.[227] Fur-

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[219] *Ex parte State*, 2014 WL 983288, at *4–5 (citing *Skilling*, 561 U.S. at 381–85); *Luong*, 2013 WL 598119, at *12 (citing United States v. Diehl-Armstrong, 739 F. Supp. 2d 786, 793 (W.D. Pa. 2010)).
[220] *Ex parte State*, 2014 WL 983288, at *7–8.
[221] *Luong*, 2013 WL 598119, at *20–21, *38.
[222] *Ex parte State*, 2014 WL 983288, at *1, *4–8.
[223] *Id.* at *5; *Luong*, 2013 WL 598119, at *12.
[224] *Ex parte State*, 2014 WL 983288, at *5; *Luong*, 2013 WL 598119, at *12.
[225] *Compare Ex parte State*, 2014 WL 983288, at *5 (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1044 (1991) (plurality opinion) (finding population of 600,000 reduced likelihood of presumed prejudice)), *with Luong*, 2013 WL 598119, at *12. *But cf.* Rideau v. Louisiana, 373 U.S. 723, 724, 726 (1963) (finding presumed prejudice in population of 150,000).
[226] *Luong*, 2013 WL 598119, at *12–18.
[227] *Id.* at *18.

thermore, several articles asked readers with waterfront properties to walk along their properties to assist in finding the bodies of the victims.[228] Articles also described the community's response to the murders and the efforts of local citizens to assist in locating the bodies of the children.[229] In addition, local television news stations combined to air more than 600 news stories regarding the crimes.[230] One local station also hosted an online forum titled "How Should the Baby Killer be Dealt With," viewed more than 16,000 times.[231] In reviewing these articles and broadcasts, the Court of Criminal Appeals found that despite much of the reporting being objective, many of the reports were so inflammatory that "it would appear that Luong was tried and convicted before his trial."[232]

The Alabama Supreme Court reviewed the media coverage and came to a different conclusion.[233] The court sided with the State's argument that if a certain threshold of publicity rises to a presumptive level of prejudice, then cases that garner national attention could never find an impartial trial.[234] The court also held that despite the news coverage being unflattering towards the defendant, the coverage was mostly factual accounts of the crime and the trial.[235] Furthermore, the court reasoned that despite the many negative comments made about Luong on online message boards and call-in telephone lines, several commenters stated Luong "'was entitled to his day in court.'"[236] Relying on *Woodward*, the Alabama Supreme Court stated that "in this age of digital communication, the published opinions of certain of the citizens in this particular community" could not raise a presumption that Mobile County could not hold a fair trial for Luong.[237] To refute Luong's argument that the publicity regarding Luong's confession and his withdrawn guilty plea raised impermissible prejudice, the court noted that the admission of Luong's confession at trial negated the risk of

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[228] *Id.* Luong was accused of killing his children and throwing their bodies off of a bridge into the water below. *Id.* at *1.
[229] *Id.* at *18 (noting at one point over 150 people volunteered with the search efforts).
[230] *Id.* at *19.
[231] *Luong*, 2013 WL 598119, at *19.
[232] *Id.*
[233] *Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *5–6 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014).
[234] *Id.* at *5.
[235] *Id.*
[236] *Id.*
[237] *Id.*

prejudice to the jury.[238] Overall, the court held that the media coverage did not incite "anger, revulsion, and indignation to the degree that jurors chosen from citizens of Mobile County could not determine Luong's guilt or innocence based solely on the evidence presented at trial."[239]

Both courts noted that the bulk of the publicity surrounding Luong's case came during the first month following the murders, more than a year before the trial.[240] The timing of the publicity may not have been a significant factor due to the idea that the passage of time can reduce the prejudicial effect of inflammatory publicity.[241] Ultimately, because the bulk of the news coverage was so far removed from the time of the trial, the timing of the publicity had little to no effect on the presumption of prejudice.[242]

The two courts came to different conclusions as to whether the media interfered with the trial.[243] The Court of Criminal Appeals noted that several news outlets had approached the trial court regarding the use of cameras in the courtroom, and during jury voir dire, the court excused one of the potential jurors through a rear exit to avoid the media.[244] Conversely, the Alabama Supreme Court held that the measures taken by the trial court were "precisely the type of preventive measures courts should take to avoid tainting the jury."[245] Ultimately, the Alabama Supreme Court found that the media did not actually interfere with Luong's trial nor with the jurors.[246]

The Court of Criminal Appeals distinguished *Luong* from the findings of *Skilling* in that Luong was not acquitted of any charges.[247] In this analysis, the court seemingly combined factors three and four from *Skilling* into one factor: thus, the court did not apply

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[238] *Id.* at *6.
[239] *See Ex parte State*, 2014 WL 983288, at *6.
[240] *Id.* at *6; Luong v. State, CR-08-1219, 2013 WL 598119, at *20 (Ala. Crim. App. Feb. 15, 2013), *rev'd*, 2014 WL 983288 (Ala. Mar. 14, 2014).
[241] *Ex parte State*, 2014 WL 983288, at *6 (citing *Ex parte* Travis, 776 So. 2d 874, 878 (Ala. 2000)); *Luong*, 2013 WL 598119, at *20 (quoting *Ex parte Travis*, 776 So. 2d at 878).
[242] *See Ex parte State*, 2014 WL 983288, at *6 (citing *Ex parte Travis*, 776 So. 2d at 878).
[243] *Compare Ex parte State*, 2014 WL 983288, at *6, *with Luong*, 2013 WL 598119, at *20–21.
[244] *Luong*, 2013 WL 598119, at *20.
[245] *Ex parte State*, 2014 WL 983288, at *6.
[246] *Id.*
[247] *Luong*, 2013 WL 598119, at *20.

a pure version of the *Skilling* factors.[248] Similarly, the Alabama Supreme Court considered that Luong was not acquitted of any charges in relation to possible media interference.[249]

Along with the content of the media coverage, another factor, although not directly addressed in *Skilling*, was the involvement and response of the community following the murders.[250] The Alabama Supreme Court noted that the Court of Criminal Appeals looked to the holdings in *Rideau v. Louisiana*[251] and *State v. James*[252] to come to the conclusion that the community's ties to the case had a presumptively prejudicial effect on the trial.[253] While the Alabama Supreme Court recognized the influential effect of these cases, the court ultimately held that these two cases were distinguishable, finding no presumption of prejudice based on the community involvement.[254]

The Alabama Supreme Court held the *James* case was distinguishable because the community in *James* was much smaller than Mobile County.[255] Moreover, the defendant in *James* played the part of a "victim" by leading the community to believe the victim was still alive whereas the publicity and actions of the Mobile community came about after the children were dead.[256] These factors, according to the court, made the community reaction in *Ex parte State* less inflammatory and led to the finding that the trial court properly denied the motion to change venue.[257]

The Alabama Supreme Court also distinguished *Rideau*.[258] The court clung to the language from *Rideau* that the broadcasting of the defendant's confession on television and the associated media coverage led to the conclusion that the defendant was "tried" in the media.[259] The court distinguished the instant case by finding that nothing as prejudicial as Luong's confession was broadcast in the community and that the community in *Rideau* was much smaller

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[248] *See id.*; *see also* Skilling v. United States, 561 U.S. 358, 383 (2010) (discussing the timeliness of the publicity and the fact that Skilling was acquitted of some charges separately).
[249] *Ex parte State*, 2014 WL 983288, at *6.
[250] *Id.* at *7.
[251] 373 U.S. 723 (1963).
[252] 767 P.2d 549 (Utah 1989).
[253] *Ex parte State*, 2014 WL 293288, at *7.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* at *7–8.
[258] *See id.* at *7.
[259] *Ex parte State*, 2014 WL 983288, at *7.

than Mobile.[260] The content of the coverage and its effect on the smaller community ultimately led the court to find there was not a presumption of prejudice.[261]

The Alabama Supreme Court also distinguished Luong's case from the finding in *Wilson v. State*.[262] In *Wilson*, the community pressured local law enforcement to arrest the defendant for his crime.[263] Furthermore, there was evidence that the community wanted retribution against the defendant because twenty years prior to the defendant's trial the defendant's grandfather was acquitted of a charge of murdering a local civil rights activist.[264] The court, in reviewing Luong's case, found it distinguishable and held that "no evidence indicates that the community demanded Luong's arrest or that an underlying bias against Luong existed at the time of trial."[265]

In concluding its analysis of presumed prejudice, the Alabama Supreme Court referenced the ease with which citizens can acquire news information of sensational stories.[266] Because information is shared so quickly, the court reasoned that finding a jury who knew absolutely nothing about the trial would likely prove to be a fool's errand.[267] After reviewing all of the factors, the court held that the trial court did not abuse its discretion in denying the motion to change venue and reversed the holding of the Court of Criminal Appeals.[268]

3. Reconciling the Two-Part Test with the *Skilling* Factors

As can sometimes happen when reviewing court precedent, Alabama courts have recently applied differing tests in determining presumed prejudice. As discussed above, the courts have applied the two–part test of looking to whether the pretrial publicity was inflammatory and whether the publicity saturated the community.[269] Following the holding in *Skilling*, at least one case looked to include at least some form of the four-factor *Skilling* test.[270] However, in the fairly recent case of *Lockhart v. State*, the Court of Crimi-

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[260] *Id.*
[261] *Id.*
[262] *Id.*; Wilson v. State, 480 So. 2d 78 (Ala. Crim. App. 1985).
[263] *Ex parte State*, 2014 WL 983288, at *7.
[264] *Id.*
[265] *Id.* at *8.
[266] *Id.*
[267] *See id.*
[268] *Id.*
[269] *See supra* Part III.B.1.
[270] *See Ex parte State*, 2014 WL 983288, at *4–6.

nal Appeals referred to the language of the two-part test without mentioning *Skilling*.[271] This volley of standards can create confusion for the counselor seeking to convince a court to change venue.[272] However, with the Alabama Supreme Court looking to the *Skilling* factors for its analysis, arguably the state's high court has resolved the discrepancy.[273]

The line of *Luong* cases resolves this confusion of standards in itself. In the first two sentences of its analysis, the Court of Criminal Appeals stated, "[I]t is clear that publicity surrounding the murders completely saturated the Mobile community . . . . A great deal of that publicity was prejudicial."[274] This section followed the individual review of each of the four *Skilling*-related factors, and the court's decision in finding presumed prejudice seemingly rested more on the finding that the prejudicial publicity surrounding Luong's confession; Luong entering and withdrawing his guilty plea; Luong's criminal history; the community's mourning for the victims; and the outrage towards the defendant greatly affected the community.[275] Thus, the intermediate court appeared to use the four factors in guiding the decision to find presumed prejudice under the standard two-part test.

Similarly, the Alabama Supreme Court does not necessarily abandon the traditional analysis in *Ex parte State*. In conjunction with the discussion of the *Skilling* factors, the court quoted language from *Ex parte Fowler* that supported an application of the traditional two-part test.[276] In this decision, the court does not make any grand pronouncement of some new test that lower courts should apply. Instead, the court seems to integrate the *Skilling* factors into the existing two-part analytical framework.[277]

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[271] Lockhart v. State, CR-10-0854, 2013 WL 4710485, at *43 (Ala. Crim. App. Aug. 30, 2013).

[272] The Court of Criminal Appeals decided *Lockhart* in August 2013, after having decided *Luong* in February of that same year. *See Lockhart*, 2013 WL 4710485, at *1; Luong v. State, CR-08-1219, 2013 WL 598119, at *1 (Ala. Crim. App. Feb. 15, 2013).

[273] *See Ex parte State*, 2014 WL 983288, at *5.

[274] *Luong*, 2013 WL 598119, at *20.

[275] *See id.*

[276] *See Ex parte State*, 2014 WL 983288, at *3–4 ("To satisfy her burden of proof in the present case, [the defendant] had to establish that prejudicial pretrial publicity has so saturated [the county] as to have a probable prejudicial impact on the prospective jurors there." (quoting *Ex parte* Fowler, 574 So. 2d 745, 747–48 (Ala. 1990))).

[277] *See generally Ex parte State*, 2014 WL 983288, at *3–8 (discussing the *Skilling* factors in light of pretrial publicity and alleged community prejudice).

Despite these facially differing standards, further analysis can show that these two tests are compatible and can arrive at the same results. The traditional two-part inquiry appears to be a broader view of the *Skilling* test. The four factors announced by *Skilling* can be classified into the two factors used under the traditional approach.[278] *Skilling* factor two—content of the publications—is essentially the same as the traditional factor looking to whether the news coverage of the defendant's accused crimes and trial was either objective and factual or inflammatory and sensational. Courts can then look to whether the size and character of the community, timing of the publicity, and if the defendant was acquitted of any charges at trial shows the level of saturation of publicity within the community. As a practical matter, whether the jury acquitted the defendant of any charges would be an issue raised on appeal, as making such an argument prior to trial obviously would be impossible. Furthermore, the adapted factors the *Luong* court applied can also follow the same analysis, as media interference would factor into showing the level of saturation of the publicity in the community.[279]

Overall, the two lines of analysis in looking for presumed prejudice are compatible. Prosecutors and defense attorneys should probably argue under both tests because the ultimate result will likely be the same. One could argue that the United States Supreme Court's use of the *Skilling* factors were intended to guide other courts in reviewing claims of presumed prejudice rather than mandating hard-and-fast rules. The Alabama Supreme Court's use of the *Skilling* factors also sends a signal that lower courts should consider these factors when addressing claims of presumed prejudice. As a practical consideration, attorneys arguing issues of change of venue likely would be best served to argue satisfaction of the traditional two-part test by reviewing the factors announced in *Skilling* and *Ex parte State*, as these sub-factors aid in proving the broader factors of the traditional test. Furthermore, given the *Skilling* factors' more practical use on review, trial attorneys and judges may be better served to apply the two-part test at trial (with consideration of known *Skilling* factors), and appellate review may apply the *Skilling* factors more strongly. Overall, though, attorneys must

[278] Those factors being: (1) size and characteristics of the community; (2) content of news reports; (3) timing of the publicity; and (4) whether the defendant was acquitted of any charges at trial. *See* Skilling v. United States, 561 U.S. 358, 381–84 (2010).

[279] These modified *Skilling* factors: (1) size and characteristics of the community; (2) general content of the media coverage; (3) timing of the media coverage; and (4) media interference. *Luong*, 2013 WL 598119, at *12.

keep in mind that findings of presumed prejudice are extremely rare, and the test carries a high burden for the defendant.[280]

C. Sources of Prejudice

Several factors can affect the ability to have a fair trial in a county, requiring a change of venue. As previously discussed, pretrial news coverage can be a factor.[281] Part of this publicity can come from prosecutors' statements regarding the case.[282] The publication or broadcasting of the defendant's confession weighs on the courts' decisions regarding prejudice, however reports that the defendant confessed or withdrew a guilty plea does not necessitate a presumption of prejudice.[283] Furthermore, courts have, to some degree, considered the argument that news reports include inadmissible evidence or evidence not presented to the jury as a factor of prejudice, whereas if the evidence in the news is also admitted at trial then the presumption of prejudice is less.[284] An additional source of prejudice is information about a case that a potential juror may gather from speaking to colleagues while at work, especially if the potential juror works for a law enforcement agency involved in the investigation of the case.[285] Some jurors learn of information about a case from more obscure sources, such as listening to police scanners or radios in their home.[286] Word-of-mouth communications between residents in a community is another

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[280] *E.g.*, Hunt v. State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993) (quoting Coleman v. Kemp, 778 F.2d 1487, 1537 (11th Cir. 1985)).

[281] *See* Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (reversing conviction based on prejudicial pretrial publicity); *Hunt*, 642 So. 2d at 1042–45 (discussing reasons for denial of former governor's claim his trial was prejudiced by pretrial publicity).

[282] *See* Brown v. State, 632 So. 2d 14, 16 (Ala. 1992) (discussing the prosecutor's statements regarding the heinousness of the charged crimes).

[283] *See Skilling*, 561 U.S. at 382–83 (discussing lack of reports of defendant confessing as weighing against a presumption of prejudice); *Rideau*, 373 U.S. at 726 (discussing prejudicial nature of defendant's televised confession). *But cf. Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *6 (Ala. Mar. 14, 2014) (finding that factual reporting of defendant's confession and guilty plea did not necessarily raise a presumption of prejudice when that evidence was admissible at trial).

[284] *See Ex parte State*, 2014 WL 983288, at *6; McCray v. State, 88 So. 3d 1, 67, 70–71 (Ala. Crim. App. 2010) (the inadmissibility of the information in the news reports was argued by defense counsel, but the court still refused to reverse on the grounds of presumed prejudice because the publicity was mostly factual and did not saturate the community).

[285] *See, e.g.*, Oryang v. State, 642 So. 2d 979, 984 (Ala. Crim. App. 1993).

[286] *Id.* at 984.

means that news of a case can spread.[287] One court addressed claims that a community may view the defendant's family in a negative light, and the jury pool may be prejudiced by a feeling that justice should be sought for deeds committed by the defendant's family rather than the defendant's charged crime.[288] With the growth of the "digital age," internet blogs and social media are other sources of information that the courts have addressed, and because of the ease of access to news reports, the necessity to change venue to avoid the presumption of prejudice is dwindling.[289]

Courts also consider public demonstrations or showings of community response to a defendant's charged crimes. In *Wilson v. State*, the Court of Criminal Appeals reviewed a case where public protests were planned regarding a racially-charged murder trial in Macon County, Alabama, and the court ultimately reversed the conviction based on a finding that prejudice permeated the county.[290] Similarly, the court in *Hines v. State* addressed a venue change due to racial protests, but the defendant moved for a second change because the protests followed the defendant to the transferee county.[291] The *Hines* court remanded the case, holding that a second change of venue may be necessary in light of continued racial animus, protests, and even bomb threats surrounding the trial.[292] In *Luong*, the Court of Criminal Appeals also noted community involvement where local citizens were invited to the victims' graveside services, the victims' family provided an appreciation dinner for volunteers who helped search for the victims' remains, and the community observed a moment of silence for the victims at

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[287] *See* Coleman v. Kemp, 778 F.2d 1487, 1533–34 (11th Cir. 1985); Parker v. State, 587 So. 2d 1072, 1080 (Ala. Crim. App. 1991).

[288] Wilson v. State, 480 So. 2d 78, 81–82 (Ala. Crim. App. 1985). In fact, the court in *Ex parte State* distinguished *Wilson*, holding that,"[u]nlike the record in *Wilson*, the record in [Luong's] case does not establish that bias and prejudice permeated the Mobile community at the time of Luong's trial." *Ex parte State*, 2014 WL 983288, at *8.

[289] *See Ex parte State*, 2014 WL 983288, at *3, *8 (citing Calley v. Callaway, 519 F.2d 184, 210 (5th Cir. 1975)); Lockhart v. State, CR-10-0854, 2013 WL 4710485, at *43 (Ala. Crim. App. Aug. 30, 2013); Woodward v. State, 123 So. 3d 989, 1050–51 (Ala. Crim. App. 2011); McMillan v. State, CR-08-1954, 2010 WL 4380259, *52 (Ala. Crim. App. Nov. 5, 2010). *See generally* Brown, *supra* note 206 (discussing the role of social media in spreading possible prejudicial information and the subsequent effects on jury selection).

[290] *Wilson*, 480 So. 2d at 80–82. The court also discussed the Sheriff's public appeals to the community to remain calm during the investigation of the case. *Id.* at 80–81.

[291] Hines v. State, 384 So. 2d 1171, 1183 (Ala. Crim. App. 1980).

[292] *Id.* at 1183–84.

a local Mardi Gras parade.[293] In contrast, the Alabama Supreme Court held that "[t]his type of community involvement . . . does not create a presumption of bias against Luong; rather, it indicates the humanity and mercy of the citizens of Mobile County."[294] Accordingly, it appears that courts should look to whether the context of the public reaction is condemning of the accused, which may raise a presumption of prejudice, or is supportive of the victims, which will not raise a presumption.

While indications showing prejudice are important, courts also look to factors that mitigate prejudice. One particular factor is time. Courts have held that "[t]he passage of time cannot be ignored as a factor in bringing objectivity to the trial."[295] Depending on the case, dissipation may only require a matter of weeks, months,[296] or sometimes the passage of years is sufficient to find prejudice was no longer a significant factor.[297] Moreover, the size of a community or a metropolitan area can factor into the dissipation of prejudice as courts have held that areas with larger populations are less susceptible to prejudicial pretrial publicity.[298] Furthermore, with the increased access to information over television and the internet, courts face the reality that moving the trial is not necessarily an effective means of insulating the jury pool from improperly persuasive information.[299] Overall, though, courts may resign to the idea that "'change of venue is not . . . a panacea to the prob-

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[293] Luong v. State, CR-08-1219, 2013 WL 598119, at *18 (Ala. Crim. App. Feb. 15, 2013).

[294] *Ex parte State*, 2014 WL 983288, at *8.

[295] Dannelly v. State, 254 So. 2d 434, 435 (Ala. Crim. App. 1971).

[296] *See id.* (noting nine months passed between the time of crime and the defendant's trial); *see also* Skilling v. United States, 561 U.S. 358, 384–85 (2010) (noting with approval that trial court delayed beginning of trial following a co-defendant's guilty plea in order to allow prejudice to dissipate).

[297] *See Ex parte State*, 2014 WL 983288, at *6 (citing *Ex parte* Travis, 776 So. 2d 874, 879 (Ala. 2000)) (holding that majority of news reports being published more than a year prior to trial supported a finding that the reports would not affect the jury); Cherry v. State, 933 So. 2d 377, 383–84 (Ala. Crim. App. 2004) (citing Blanton v. State, 886 So. 2d 850, 876–77 (Ala. Crim. App. 2003)) (discussing passage of time as a factor in cases of defendants who were convicted of church bombing almost forty years following the incident).

[298] Mathis v. State, 296 So. 2d 755, 759 (Ala. Crim. App. 1973) (citing Beddow v. State, 96 So. 2d 175, 176 (Ala. Ct. App. 1956)); *see also Skilling*, 561 U.S. at 382 (discussing how size of a community can mitigate the need to change venue); *Ex parte State*, 2014 WL 983288, at *5 (applying the *Skilling* factor).

[299] *See, e.g.*, *Ex parte State*, 2014 WL 983288, at *5.

lems posed by pretrial publicity[,]'" and a change of venue simply will not provide a better trial setting.[300]

IV. APPELLATE REVIEW OF DENIAL OF MOTION TO CHANGE VENUE

If the trial court denies the defendant's motion for a change of venue, the defendant can appeal the decision.[301] Despite the allowance of appellate review, one can come to some confusion as to the standard of review or level of deference afforded to the trial court's decision. A reading of the statute addressing appellate review indicates a de novo standard.[302] However, the promulgation of Alabama Rule of Criminal Procedure 10.1 and several case holdings raise questions as to the current validity of the statute and whether abuse of discretion is the appropriate standard.[303] Beyond any standard of review, though, defendants generally must raise issues of venue at the trial level—with the exception of cases involving the death penalty—if they wish to seek a reversal on appeal.[304] Thus, when seeking appellate review, practitioners must be mindful of the timing in which they make motions and the proper arguments to make.

As previously discussed, the Alabama legislature has the authority to enact statutes regarding change of venue.[305] Additionally, the Alabama Supreme Court has the authority to promulgate pro-

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[300] Wilson v. State, 480 So. 2d 78, 79 (Ala. Crim. App. 1985) (quoting John Scripp, Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME L. REV. 925, 941 (1967)).

[301] ALA. CODE § 15-2-20(b) (LexisNexis 2011).

[302] *See id.* (indicating that appellate courts will review a trial court's denial of a motion to change venue without any presumption in favor of the judgment).

[303] *See* ALA. CONST. art. VI, § 150, *amended by* ALA. CONST. amend. 328 (granting Alabama Supreme Court power to promulgate procedural rules of court); ALA. CODE § 15-1-1 (LexisNexis 2011) (stating that procedural rules created by the court supersede any conflicting statutes under this title); Hunt v. State, 642 So. 2d 999, 1042 (Ala. Crim. App. 1993) ("The yardstick by which this court measures the correctness of a trial court's ruling on a motion for change of venue is whether the trial court 'abused its discretion' in denying the motion."); *see also Ex parte* Sorsby, 12 So. 3d 139, 145, 147 (discussing Supreme Court's ability to promulgate procedural rules).

[304] *See* ALA. R. CRIM. P. 10.2(a) (defendant waives rights under Rule 10.1 if not asserted prior to commencement of proceedings or continuing with the trial after grounds for objection become apparent); ALA. R. APP. P. 45A (reviewing all issues in death penalty cases for plain error regardless of if issues were raised to trial court); Sistrunk v. State, 630 So. 2d 147, 148 (Ala. Crim. App. 1993) (citing Hansen v. State, 598 So. 2d 1, 2 (Ala. Crim. App. 1991)) (though addressing issues regarding the races of members of the jury, court held that issues, including constitutional issues, are barred from appellate review if not first raised at trial level).

[305] *See supra* note 12, and accompanying text.

cedural rules of court.[306] When a procedural rule and a statute address the same topic, the statute should yield to the rule in the event of conflict.[307] Thus, the interplay between the rules and the statutes requires close analysis of what effect the rules have on various aspects of motions to change venue.

A. When an Appeal of Trial Court's Decision May be Raised

Section 15-2-20(b) of the Code allows for appellate review, but the plain language of the statute indicates that Alabama appellate courts cannot review denials of motions to change venue on interlocutory appeals because review can only arise "after final judgment."[308] With this statute in mind, the Alabama Supreme Court has found that writs of mandamus prior to the conclusion of trial are improper when seeking change of venue.[309] In determining whether a judgment is final, the Court of Criminal Appeals stated, "[T]he test of finality of a judgment is . . . whether such judgment or decree ascertains and declares [the parties' acquired rights] embracing the substantial merits of the controversy and material issues litigated or necessarily involved in the litigation."[310] Furthermore, an interlocutory appeal from a ruling denying a motion for change of venue is improper because Alabama courts have recognized that such appeals are in contrast to the statute requiring that appeals follow final judgment.[311] Even in the current era Alabama Rules of Criminal Procedure, the Court of Criminal Appeals reaffirmed the position that mandamus is an inappropriate remedy for denying a motion to change venue because mandamus should be reserved for issues where there is no appellate remedy.[312] Taking the statute and precedent into account, a defendant can appeal his denial of his motion to change venue only following his conviction. The convicted defendant must file his notice of appeal within forty-

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[306] ALA. CONST. art. VI, § 150, *amended by* ALA. CONST. amend. 328.

[307] *Ex parte Sorsby*, 12 So. 3d at 147 (quoting *Ex parte* Oswalt, 686 So. 2d 368, 370–71 (Ala. 1996)); *see also* ALA. CODE § 15-1-1 (LexisNexis 2011).

[308] ALA. CODE § 15-2-20(b) (LexisNexis 2011) ("The refusal of [a defendant's application for change of venue] may, after final judgment, be reviewed and revised on appeal . . . .").

[309] *Ex parte* Fowler, 574 So. 2d 745, 746 (Ala. 1990).

[310] Coleman v. State, 539 So. 2d 454, 456 (Ala. Crim. App. 1988) (internal quotation marks omitted) (quoting Griffith v. State, 61 So. 2d 870, 871 (Ala. Crim. App. 1952)).

[311] *Griffith*, 61 So. 2d at 871 (citing Bryan v. State, 43 Ala. 321, 323 (1869)) ("[A] ruling on an application for change of venue is not a final judgment from which an appeal can be prosecuted.").

[312] *Ex parte* Price, 715 So. 2d 856, 857, 859 (Ala. Crim. App. 1997) (citing *Ex parte* Spears, 621 So. 2d 1255, 1257–58 (Ala. 1993)).

two days—or six weeks—of his sentencing date or the date when the trial court denies or overrules any post-trial motions, whichever is later.[313]

Furthermore, the language of section 15-2-20(b) indicates that an appeal may follow a "refusal" of a motion to change venue.[314] Such a reading indicates that the State is without remedy if the trial court grants a change of venue. This author's research has not found a case where the State attempted to appeal a trial court's granting a defendant's motion to change venue. Arguably, because of the limited availability of appeal for the prosecution, the State could seek the extraordinary relief provided by a writ of mandamus to prevent a change of venue.[315] One case has shown that the State has sought mandamus relief when the trial court granted a defendant's motion to change venue.[316] However, a central issue of this case was whether the trial should be transferred from Montgomery County to Mobile County because, as the defendant argued, Montgomery County was without jurisdiction to hear the case at all, not that the defendant could not receive a fair trial.[317] The author's research has failed to find a case where the prosecution sought a writ of mandamus following the trial court's grant of a change of venue on grounds of prejudice.

B. What the Appellate Courts will Review

On appellate review, courts require actual documented proof for the defendant to prove his claim of prejudice. "An appellate court is bound by the record and cannot consider contentions in defendant's brief that are not supported by the record."[318] This requirement falls in line with the defendant's burden to prove to the court's "reasonable satisfaction" that a fair trial would be im-

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[313] ALA. R. APP. P. 4(b)(1). The post-trial motions include a motion in arrest of judgment, a motion for new trial, or motion for judgment of acquittal. *Id.*

[314] ALA. CODE § 15-2-20(b) (LexisNexis 2011).

[315] *See* State v. A.R.C., 873 So. 2d 261, 265–67 (Ala. Crim. App. 2003) (citing ALA. CODE §§ 12-12-70, 12-22-90, 12-22-91; ALA. R. CRIM. P. 15.7). The State can appeal pretrial rulings if the State meets certain requirements, and those appeals are generally limited to "a pretrial ruling holding a statute unconstitutional, suppressing evidence, dismissing the charges, quashing an arrest or search warrant, or granting a habeas corpus petition and ordering an individual release from custody." *Id.; see, e.g.*, *Ex parte* Fowler, 574 So. 2d 745, 747 (Ala. 1990) (citing Echols v. Hous. Auth. of Auburn, 377 So. 2d 952 (Ala. 1979)) (a writ of mandamus is an extraordinary writ that is only available when the petitioner has no adequate remedy on appeal).

[316] *See Ex parte* Hunte, 436 So. 2d 806, 809–11 (Ala. 1983).

[317] *See id.* at 807–10.

[318] Turk v. State, 348 So. 2d 878, 880 (Ala. Crim. App. 1977) (citations omitted).

practical[319] and the bar on raising new issues on appeal.[320] Thus, at the trial level, a defendant must provide documented evidence supporting his motion, and such evidence must be preserved on the record in order to persuade the reviewing appellate courts.[321] This procedural requirement promotes fairness in that appellate courts do not second-guess trial courts by using evidence and information that the trial courts were not given to consider.

In some trials, the defendant will move for a change of venue multiple times.[322] Courts have held that when defendants make multiple motions for a change of venue and each motion is denied, the appellate court needs only to review the last denial.[323] The reasoning behind this, according to the Alabama Supreme Court, is that the court wants to avoid paradoxical situations in which a reviewing court may find that at the time of the first motion change of venue was proper, yet upon review of a second motion change of venue would not be proper.[324] This sort of review would leave the court in a quandary if it were to find that at time of the defendant's actual trial and conviction he was not prejudiced, but months, or possibly years, prior to that point, the jury panel was prejudiced against the defendant.[325] Thus, a defendant wishing to have the denial of his motion to change venue reversed is best served by making his initial motion and relying solely on that motion, unless prejudice has noticeably increased to the point where the defendant has a substantially stronger chance of having the trial court grant the motion—or at least a greater chance of the appellate court reversing the trial court. Trial judges may avoid this issue, to a degree, by delaying any ruling on questionable pretrial motions to change venue until voir dire, thus assessing the likelihood of the defendant receiving a fair trial at the time of the actual proceedings.[326] Trial courts may also continue the case in hopes that publicity will dissipate.[327]

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[319] *See* ALA. R. CRIM. P. 10.1(b).

[320] *See* Sistrunk v. State, 630 So. 2d 147, 148 (Ala. Crim. App. 1993) (citing Hansen v. State, 598 So. 2d 1, 2 (Ala. Crim. App. 1991)) (barring claims not first raised at trial).

[321] Brown v. State, 74 So. 3d 984, 1032–33 (Ala. Crim. App. 2010).

[322] *See, e.g.*, Colley v. State, 405 So. 2d 374, 379 (Ala. Crim. App. 1979), *rev'd on other grounds*, 405 So. 2d 391 (Ala. 1981).

[323] *Id.* (citing Hawes v. State, 7 So. 302, 306 (Ala. 1890)).

[324] *See Hawes*, 7 So. at 306.

[325] *Id.*

[326] *See* Luong v. State, No. CR-08-1219, 2013 WL 598119, at *3 (Ala. Crim. App. Feb. 15, 2013), *rev'd on other grounds*, No. 1121097, 2014 WL 983288 (Ala. Mar. 14, 2014); *see also* Anderson v. State, 362 So. 2d 1296, 1300 (Ala. Crim. App. 1978)

C. Standard of Review

In determining the proper standard of review, a reading of statutes and case law may find some confusion regarding the weight appellate courts give—or ought to give—to the trial court's denial of a motion to change venue. Some support exists for the *de novo* standard of review.[328] Many decisions hold that the correct standard of review is abuse of discretion.[329] Other courts have seemingly adopted a hybrid approach: "In determining whether there has been an abuse of . . . discretion, an appellate court reviews the trial judge's order de novo without any presumption in favor of that order."[330] However, despite this initial confusion, the courts, over years of reviewing motions to change venue, have provided guidance for practitioners arguing for (or against) the propriety of a trial judge's denial of change of venue.

At first glance of the statute, the appellate courts are not to give the trial court's decision any deference. The Alabama Supreme Court or the Court of Criminal Appeals can decide to reverse and remand the decision "without any presumption in favor of the judgment or ruling of the lower court on such application."[331] Some Alabama court decisions indicate that this provides a de novo standard of review.[332] Under this view of the statutory language, while defendants have the burden to prove the necessity of changing venue, the appellate courts are to reach their own conclusions in the same manner as the trial courts would.[333]

(voir dire is the proper method to determine prejudicial effect of pretrial publicity).

[327] Mathis v. State, 296 So. 2d 755, 759 (Ala. Crim. App. 1973) (citing Dannelly v. State, 254 So. 2d 434, 435 (Ala. Crim. App. 1971)) ("[T]he matter of publicity is sometimes not remediable by a change to the next county, but may have to be solved by way of a continuance so that the ripples of the publicity die down."). *But see* Smith v. State, 797 So. 2d 503, 523 (Ala. Crim. App. 2000) ("[A] motion for a continuance is not the proper remedy to seek relief based on prejudicial pretrial publicity surrounding a case—the proper remedy is to seek for a change of venue."); Wiggins v. State, 104 So. 2d 560, 563 (Ala. Crim. App. 1958) ("[A] motion for continuance should not lie on the ground of community prejudice; a motion for a change of venue is the proper expedient . . . .").

[328] *See, e.g.*, Wilson v. State, 480 So. 2d 78, 80 (Ala. Crim. App. 1985) (citing Gilliland v. State, 277 So. 2d 901, 903 (Ala. 1973)).

[329] *See, e.g.*, Hunt v. State, 642 So. 2d 999, 1042 (Ala. Crim. App. 1993).

[330] *Ex parte* Fowler, 574 So. 2d 745, 748 (Ala. 1990) (citing ALA. CODE § 15-2-20 (1975); *Gilliland*, 277 So. 2d at 903).

[331] ALA. CODE § 15-2-20(b).

[332] *Wilson*, 480 So. 2d at 80 (citing *Gilliland*, 277 So. 2d at 903).

[333] Godau v. State, 60 So. 908, 911 (Ala. 1913) (discussing that the law requires the appellate court to decide change of venue in a similar manner the trial court would).

However, a reading of some cases may raise questions as to the use of de novo review. Several cases indicate that the appellate court reviews the trial court's decision regarding change of venue for abuse of discretion.[334] The Alabama Court of Criminal Appeals has held, "[a] judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision."[335] Support for this standard of review seems reasonable—because the trial court is in the best position to judge the effects of any claimed prejudicial influences on the trial, appellate courts should not reverse that decision unless the defendant proves the trial judge abused his discretion.[336] Furthermore, Alabama courts have referenced a reliance on the trial court's discretion in granting change of venue since the nineteenth century.[337] In 1993, the Alabama Court of Criminal appeals appeared to announce abuse of discretion as *the* standard for reviewing courts to apply when the court stated, "[t]he yardstick by which this court measures the correctness of a trial court's ruling on a motion for change of venue is whether the trial court 'abused its discretion' in denying the motion."[338] The Court of Criminal Appeals applied this standard as recently as 2013 in *Lockhart v. State*, as well, and the Alabama Supreme Court seemed to apply the abuse of discretion standard in *Ex parte State*.[339]

These seemingly competing standards of review certainly raise questions. Generally speaking, the abuse of discretion standard of review is different from the de novo standard. As stated above, abuse of discretion indicates that the trial court's ruling will not be

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[334] *See* Mathis v. State, 189 So. 2d 564, 566 (Ala. 1966); Hall v. State, 820 So. 2d 113, 122–23 (Ala. Crim. App. 1999); *Hunt*, 642 So. 2d at 1042.

[335] State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996) (internal quotation marks omitted) (quoting Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979)). A more light-hearted view comes from Judge Alex Kozinski of the Ninth Circuit Court of Appeals, who described abuse of discretion when reviewing the admissibility of evidence as, "'Would the trial judge have to have been drunk or crazy to make this decision?' If we think a sober person could come to that conclusion, then we have to let it stand." Alex Kozinski, *Expert Testimony After Daubert*, J. ACCT., July 2001, at 59, 60.

[336] Nelson v. State, 440 So. 2d 1130, 1132 (Ala. Crim. App. 1983); *see also Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *10 (Ala. Mar. 14, 2014) (citing Skilling v. United States, 561 U.S. 358, 386–87 (2010)) (discussing trial judge being in best position to judge effect of pretrial publicity in discussion of decision to allow individual voir dire).

[337] *See* State v. Ware, 10 Ala. 814, 816 (1846).

[338] *Hunt*, 642 So. 2d at 1042.

[339] *See Ex parte State*, 2014 WL 983288, at *10; Lockhart v. State, No. CR-10-0854, 2013 WL 4710485, at *45 (Ala. Crim. App. Aug. 30, 2013).

overturned absent a showing the judge erroneously applied the law or the evidence on record does not support the court's decision.[340] Such a standard implies some deference to the trial court's opinion. In contrast, the de novo standard typically involves a fresh review of the facts of the case to determine a proper application of the law without any presumption in favor of prior rulings.[341] The language of Code of Alabama section 15-2-20(b) indicates a preference for de novo review without presumption in favor of the trial court's judgment, so one may assume de novo is the proper standard.[342] Adding to the confusion, some courts have held that the decision to grant or deny a motion to change venue is within the proper discretion of the trial court, and the abuse of that discretion will be reviewed de novo.[343] This compound standard of review seemingly requires a reviewing court to apply two standards of review at once. Ultimately, a reading of the statute may raise the question as to why courts would apply an abuse of discretion standard in the face of the plain language of the statute, if the statute was meant to apply a true de novo review.

With the adoption of the Alabama Rules of Criminal Procedure, one may believe that the rules supersede the statute, thus the de novo language does not affect the courts' review.[344] While Alabama law intends for the court's rules to supersede the statutes on conflicting matters, Rule 10.1 does not address the standard of review for appeals, whereas section 15-2-20(b) does specifically.[345] Because Rule 10.1 does not address appellate review, one certainly could argue that section 15-2-20(b) and its apparent de novo standard controls.[346] An additional source of confusion for the argument that the adoption of Rule 10.1 supersedes section 15-2-20 is

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[340] *Jude*, 686 So. 2d at 530.

[341] *See* Gilliland v. State, 277 So. 2d 901, 903 (Ala. 1973) (noting de novo review of the trial court's ruling is required by statute). *Gilliland* reviewed a prior Alabama statute (Title 15, section 267), but the credits to Code of Alabama § 15-2-20 indicate that today's statute is the modern-day adoption of that statute.

[342] *See* ALA. CODE § 15-2-20(b) (LexisNexis 1975).

[343] *Ex parte* Fowler, 574 So. 2d 745, 748 (Ala. 1990).

[344] *See* ALA. CONST. art. VI, § 150, *amended by* ALA. CONST. amend. 328; *Ex parte* Sorsby, 12 So. 3d 139, 147–48 (Ala. 2007) (discussing general superiority of court rules); *see also* ALA. CODE § 15-1-1 (LexisNexis 2011) (court rules superior to statutes under Title 15).

[345] *See* § 15-1-1 ("Any provisions of this title regulating procedure shall apply only if the procedural subject matter is not governed by rules of practice and procedure adopted by the Supreme Court of Alabama."); *id.* § 15-2-20(b) (addressing appellate review); ALA. R. CRIM. P. 10.1.

[346] ALA. R. CRIM. P. 10.1; *see also* ALA. CODE § 1-1-16 (LexisNexis 2014) (specific provisions of the Code are severable if part of a statute is superseded or overruled).

that court decisions between 1977 (the year the Code of Alabama was enacted)[347] and 1991 (the year the Alabama Rules of Criminal Procedure were adopted)[348] have held that the proper standard of review is abuse of discretion.[349]

Upon closer inspection of the decades of case law that has developed concerning the issue of change of venue, some judicial decisions clear the muddy language regarding the standard of review. This clarity can come from comparing the methods in which different issues are reviewed. First, one should look to the language requiring a review without presumption in favor of the trial court's judgment, and one can even accept the argument that the abuse of discretion standard is also valid. Then, for comparison, one can look to the language courts have used in review of denials of motions for a new trial: "A trial judge's denial of a motion for new trial will not be disturbed in the absence of a showing of abuse of discretion, and [the court] *will indulge every presumption in favor of the correctness of the trial court's ruling*."[350] This distinction of when the appellate courts presume in favor of the trial court and when the appellate courts will not make such a presumption can lead to an interesting conclusion. Essentially, courts will review the trial court's decision to deny a motion to change venue—not presuming the trial court correctly interpreted the facts and reached the correct conclusion—and if the appellate court finds that the trial judge's decision was reasonable, the appellate court will affirm the trial court's decision. The appellate court may affirm even if the court would have decided differently than the trial court. This position would contrast with the review of a denial of a motion for a new trial where the appellate court seemingly presumes the trial court is correct and requires the defendant to rebut that presumption.

Support for this interpretation is within *Gordon v. State*, where the Court of Criminal Appeals reviewed a predecessor statute to section 15-2-20(b).[351] As the *Gordon* court stated, "[i]t is not enough

[347] Ala. State Legislature, *Code of Alabama*, THE ALABAMA LEGISLATURE LEGISLATIVE GLOSSARY, http://www.legislature.state.al.us/misc/legislativeprocess/legislativeglossary.html (last visited Mar. 8, 2014).

[348] *Ex parte Sorsby*, 12 So. 3d at 147.

[349] *See, e.g.*, Nelson v. State, 440 So. 2d 1130, 1132 (Ala. Crim. App. 1983) (citing Botsford v. State, 309 So. 2d 835, 842 (Ala. Crim. App. 1974)).

[350] Moye v. State, 527 So. 2d 158, 160 (Ala. Crim. App. 1987) (emphasis added) (citing Baker v. State, 477 So.2d 496, 504 (Ala. Crim. App. 1985), *overruled by Ex parte* Frazier, 562 So. 2d 560 (Ala. 1989); *see also* Vinzant v. State, 462 So.2d 1037, 1040 (Ala. Crim. App. 1984), *abrogated by* Edwards v. State, 668 So. 2d 167 (Ala. Crim. App. 1995); Leverett v. State, 462 So.2d 972, 981 (Ala. Crim. App. 1984)).

[351] *See* Gordon v. State, 114 So. 279, 279 (Ala. Crim. App. 1927).

that it may not clearly appear the ruling below was right, or that we, acting as a court of original jurisdiction, would have hesitated to have decided as the primary court has decided, but we must see, and see clearly, that its action was wrong."[352] This language reads similarly to the language used in *Ex parte Fowler*—that appellate courts will review a trial court's decision to deny a motion for change of venue for abuse of discretion, and that review will be de novo.[353] To summarize this standard of review, the appellate courts independently review the record and evidence, not to see if the trial court ruled correctly but to ensure that the trial court did not rule erroneously.

Arguably, the Alabama Supreme Court has maintained this hybrid standard of review in light of the court's recent reliance on *Ex parte Fowler* in the *Ex parte State* decision.[354] Given that the court looked to *Ex parte Fowler* for analysis of presumed prejudice, the Court also likely used a de novo review to determine if the trial court abused its discretion.[355] However, the court in *Ex parte State* mentioned that the trial court did not abuse its discretion in denying Luong's motion to change venue, so a possibility exists that the court is sliding back to a stricter review for abuse of discretion.[356] Hopefully, Alabama courts will soon clear any confusion regarding appellate review of denials of motions to change venue. Until this clarification comes, in light of the Alabama Supreme Court's recent reliance on *Ex parte Fowler*'s language,[357] appellate attorneys may be wise to look to the hybrid approach discussed above.

V. *STATE V. UPDYKE*: A CASE STUDY IN CHANGE OF VENUE

The state of Alabama is home to several colleges and universities, including Auburn University. Auburn University has many traditions surrounding its athletics programs, primarily the football team.[358] One of those traditions was rolling toilet paper on the oak trees at "Toomer's Corner" in downtown Auburn following a foot-

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[352] *Id.* (quoting Hawes v. State, 7 So. 302, 306 (Ala. 1890)).
[353] *Ex parte* Fowler, 574 So. 2d 745, 748 (Ala. 1990).
[354] *See Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, *3–4 (Ala. Mar. 14, 2014) (citing *Ex parte Fowler*, 574 So. 2d at 747–48), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014).
[355] *See id.*; *Ex parte Fowler*, 574 So. 2d at 748.
[356] *Ex parte State*, 2014 WL 983288, at *8.
[357] *See id.* at *3–4 (citing *Ex parte Fowler*, 574 So. 2d at 748).
[358] Auburn Athletics, *Auburn Tradition*, AUBURNTIGERS.COM, http://www.auburntigers.com/trads/01 _auburn _tradition.html (last visited Feb. 21, 2014).

ball game win.[359] However, this tradition changed beginning in January 2011, when a man called a popular sports talk radio show in Alabama claiming to have poisoned the trees with a herbicide.[360] Eventually, Harvey Almorn Updyke, Jr. was arrested for the crime, and in March 2013, Updyke pleaded guilty to poisoning the trees.[361] Updyke is an avid fan of Auburn University's rival, the University of Alabama.[362]

One of the pretrial issues in the case was change of venue based on pretrial publicity and concerns that the local community's ties with Auburn University would inhibit the court's ability to strike a fair and impartial jury.[363] Harvey Updyke was arrested on February 17, 2011, for Criminal Mischief in the First Degree.[364] In the spring of 2011, the Lee County Grand Jury indicted Updyke for two counts each of Criminal Mischief in the First Degree; Violation of the Farm Animal, Crop, and Research Facilities Protection Act; and Desecration of Venerated Objects.[365] Updyke first filed a motion to change venue on November 14, 2011.[366] The trial court did not grant the change of venue and proceeded to initiate trial proceedings in June 2012.[367] The court and the attorneys conducted four days of voir dire, and "more than 100 potential jurors were

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[359] Auburn Athletics, *Auburn Tradition*, AUBURNTIGERS.COM, http://www.auburntigers.com/trads/13_auburn_rolling_toomers.html (last visited Feb. 21, 2014).

[360] Aff. Charging Crime, State v. Updyke, CC-2011-000492.00 (Lee Cnty., Ala. Cir. Ct. Feb. 17, 2011) [hereinafter Arrest Warrant] (on file with author).

[361] Enoch, *supra* note 5; *see also* Arrest Warrant, *supra* note 360.

[362] *See* Wright Thompson, *The Life and Times of Harvey Updyke*, ESPN.COM (May 22, 2011), http://sports.espn.go.com/ncf/columns/story?id=6575499.

[363] *See* Motion to Change Place of Trial at 1, State v. Updyke, CC-2011-000492.00–.05 (Lee Cnty., Ala. Cir. Ct. Nov. 14, 2011) [hereinafter Venue Motion I] (on file with author); Renewed Motion to Change Place of Trial at 1, State v. Updyke, CC-2011-000492.00–.05 (Lee Cnty., Ala. Cir. Ct. Aug. 15, 2012) [hereinafter Venue Motion II] (on file with author).

[364] Arrest Warrant, *supra* note 360; Enoch, *supra* note 5. In relevant part, the Code of Alabama defines Criminal Mischief in the First Degree as the intentional damaging of property in excess of $2,500. ALA. CODE § 13A-7-21(a)(1) (LexisNexis 2014).

[365] Indictment, State v. Updyke, CC-2011-492.00–.02 (Lee Cnty. Cir. Ct. Spring Term, 2011) [hereinafter Indictment I] (on file with author); Indictment, State v. Updyke, CC-2011-492.03–.05 (Lee Cnty. Cir. Ct. Spring Term, 2011) [hereinafter Indictment II] (on file with author); *see also* § 13A-7-21 (Criminal Mischief in the First Degree); *id.* § 13A-11-153 (Violation of the Farm Animal, Crop, and Research Facilities Protection Act); *id.* § 13A-11-12 (Desecration of Venerated Objects).

[366] Venue Motion I, *supra* note 363, at 1, 4.

[367] State's Response to Defendant's Motion for Change of Venue at 2, State v. Updyke, CC-2011-492.00–.05 (Lee Cnty., Ala. Cir. Ct. Feb. 11, 2013) [hereinafter State's Response] (on file with author).

questioned at length, many of them individually."[368] During one day of the pretrial proceedings, *The Plainsman*, Auburn University's student newspaper reported that Updyke confessed to one of the newspaper's reporters.[369] Following the increased publicity, the trial court granted a defense motion to continue the trial.[370]

Updyke filed an additional motion to change venue following the continuance, citing increased difficulty in striking a fair jury.[371] The State responded to the second motion, claiming that Updyke failed to prove presumed prejudice prior to the June 2012 proceedings or to produce evidence of inaccurate or inflammatory news reports to meet the burden of proof for the second motion.[372] Following the *Luong* decision from the Court of Criminal Appeals but prior to a hearing on Updyke's motion, the State filed notice withdrawing its opposition to a change of venue.[373] Consequently, the trial court granted the motion to change venue.[374]

Analysis of the attempt to change venue should start with the first motion from Updyke. As an initial point, neither Updyke nor his attorney appeared to have sworn to the motion, as Updyke's attorney at the time signed the motion merely "Respectfully submitted."[375] Given that Rule 10.1(c) requires an application to be made on oath and courts have ruled motions not made under oath to be procedurally barred, the motion was arguably defective on its face because the motion does not indicate that the motion was sworn to or made under oath.[376]

For the sake of analysis, let us look past the oath requirement. In making the motion, the defense claimed, "[T]he City of Auburn and Lee County is [sic] so connected to Auburn University, it would be difficult to empanel a jury."[377] Updyke cited phrases from

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[368] *Id.*

[369] Andrew Yawn, *Updyke Confesses to Plainsman: 'Did I do it? Yes.'*, THE AUBURN PLAINSMAN, June 20, 2012, http://theplainsman.com/view/full_story/19040803/article-Updyke-confesses-to-Plainsman—Did-I-do-it—Yes-?.

[370] State's Response, *supra* note 367, at 2. The trial court also issued a gag order prohibiting any potential witnesses in the trial from speaking with the media about the case. *Judge Issues Gag Order in Harvey Updyke Trial*, DOTHANFIRST.COM (June 20, 2012, 10:30 PM), http://www.dothanfirst.com/story/d/story/judge-issues-gag-order-in-harvey-updyke-trial/15803/mZkZISg5n0ShJEZ-eYXJWQ.

[371] Venue Motion II, *supra* note 363.

[372] State's Response, *supra* note 367, at 2.

[373] Court Order, *supra* note 6, at 1; Withdrawal of Opp., *supra* note 6, at 4.

[374] Court Order, *supra* note 6, at 3.

[375] *See* Venue Motion I, *supra* note 363, at 4.

[376] ALA. R. CRIM. P. 10.1(c); Callahan v. State, 557 So. 2d 1292, 1306 (Ala. Crim. App. 1989) (citing oath requirement under ALA. CODE § 15-2-20(a) (LexisNexis 2011)).

[377] Venue Motion I, *supra* 363, at 1.

the official websites of the City of Auburn and Lee County indicating pride in the connections that the community has with Auburn University.[378] Updyke's attorney also alluded to the threat of mob violence in referring to an incident where Updyke was allegedly attacked at a convenience store in Opelika, also in Lee County.[379] The motion also noted that the University of Alabama and Auburn University had banned Updyke from their campuses.[380] Updyke requested to have the trial removed to Birmingham in Jefferson County, given that the courthouse was better equipped to handle the extreme publicity.[381] To support the motion, Updyke's attorney attached printouts from the City of Auburn website, the Lee County website, a news article regarding the alleged attack, a photograph of Updyke's injuries, and a letter from the University of Alabama banning him from campus and all sporting events.[382]

Given that this was a pretrial motion and Updyke never went to trial, only a review of presumed prejudice is necessary. While this incident received widespread coverage, the motion did not cite any particular news reports indicating inflammatory news publicity that saturated the community,[383] so an argument to that effect would have likely failed. However, Auburn fans did hold a rally in the days following Updyke's arrest to mourn the attack on their school's tradition.[384] Similar to *Luong v. State*, which was good law at the time, Updyke could have argued that community involvement prejudiced Updyke.[385]

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[378] *Id.* at 1–2, attachments A–B (describing Auburn University as "the economic engine that makes Lee County thrive").
[379] *Id.* at 3.
[380] *Id.* at 3, attachment F.
[381] *Id.* at 2. Defense counsel also made reference to the fact that Birmingham was a suitable location in light of the fact that Auburn University and the University of Alabama formerly played their annual rivalry game, the "Iron Bowl," in Birmingham for many years. *Id.* at 1–2. The motion also asked the court to consider Madison and Mobile Counties as other possible venues. Venue Motion I, supra note 363, at 4.
[382] *Id.* at attachments A–F.
[383] *See id.* at 1–4.
[384] *Toomer's Corner Rally Draws Thousands*, ESPN.COM, http://sports.espn.go.com/ncf/news/story?id=6139236 (last updated Feb. 19, 2011, 9:15 PM).
[385] *See* Luong v. State, CR-08-1219, 2013 WL 598119, at *21 (Ala. Crim. App. Feb. 15, 2013), *rev'd Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288 (Ala. Mar. 14, 2014), as *modified on denial of reh'g* (May 23, 2014). However, this argument may not have been as apparent in light of the fact that *Luong* had not been decided at the time of this motion. *See Luong*, 2013 WL 598119, *1 (stating that the case was decided on Feb. 15, 2013); Venue Motion I, *supra* note 363, at 4 (stating that the Motion to Change Place of Trial was filed on Nov. 14, 2011).

The argument that Updyke was at risk for mob violence carries slightly more weight. Notwithstanding the evidence indicated in the first motion, Updyke filed the motion to change venue approximately seven months after his alleged attack.[386] Thus, the trial court could have reasoned this was an isolated event and that the passage of time without further incident may have allayed any concerns. Furthermore, any argument regarding Auburn University's ties to the community may not have succeeded in light of *United States v. Skilling*, where the Supreme Court upheld the district court's decision not to change venue despite Enron's ties to the Houston community.[387]

The trial court allowed the trial to proceed to voir dire in June 2012, denying the first motion on grounds of pretrial publicity.[388] The trial judge was likely in favor of using voir dire as the primary tool to determine the effect of any source of prejudice on the community. Given the holding in *Anderson*, this appears to be a practical decision by the trial judge.[389] After conducting voir dire, reports surfaced that Updyke made incriminating statements to a reporter with Auburn University's school newspaper, and voir dire indicated that several potential jury members were aware of the case prior to the trial.[390] In light of the news report and voir dire responses of the potential jurors, the trial judge continued the trial in an attempt to allow pretrial publicity to dissipate.[391] Leading up to this incident during the June 2012 voir dire, the trial judge likely did not abuse his discretion by denying the motion for change of venue given the lack of proof of inflammatory pretrial publicity saturating the community, the lack of offered proof that the members of the community were prejudiced against Updyke in light of Auburn University's ties to the community, and that a great deal of time passed between Updyke's alleged attack and his filing his motion to change venue.

On August 15, 2012, Updyke renewed his motion to change venue, citing pretrial publicity and the prejudicial community at-

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[386] Venue Motion I, *supra* note 363, at 3–4, attachment C (noting that the alleged attacks took place in Apr. 2011
and the Motion to Change Place of Trial was filed in Nov. 2011).
[387] Skilling v. United States, 561 U.S. 358, 378–80, 385 (2010).
[388] State's Response, *supra* note 367, at 2.
[389] *See* Anderson v. State, 362 So. 2d 1296, 1300 (Ala. Crim. App. 1978).
[390] Court Order, *supra* note 6, at 2; Withdrawal of Opp., *supra* note 6, at 2; Venue Motion II, *supra* note 363, at 1; Yawn, *supra* note 369.
[391] *See* Court Order, *supra* note 6, at 2; Withdrawal of Opp., *supra* note 6, at 2; Venue Motion II, *supra* note 363, at 1; Yawn, *supra* note 369.

mosphere that affected the first jury selection process.[392] As part of his argument for changing venue, Updyke denied speaking with *The Plainsman* reporter.[393] Updyke's attorney cited sections from *Wilson v. State* in support of his motion, making reference to pretrial publicity and public demonstrations.[394] Ultimately, the claims in the second motion were similar to the claims in the first motion, but the second motion had the addition of the defendant's alleged confession in the news.[395] Like the first motion, the second motion did not appear to be sworn to or made under oath by Updyke or his attorney.[396]

On February 11, 2013, the Lee County District Attorney's Office filed a response to Updyke's motion, and the prosecution contested the change.[397] The State contended that despite the events surrounding the June 2012 voir dire and the fact that over hundred potential jurors participated in voir dire—many individually—"there remained a significant number of summoned jurors with which to conduct additional voir dire."[398] The State noted, though, that those additional jurors were released, so the parties and the court were unable to determine what effect any pretrial publicity had on those venire members.[399] Furthermore, the State noted that venire members indicating a fixed preconceived opinion to Updyke's guilt were individually questioned regarding their ability to be fair and impartial, and members whose impartiality was questionable were challenged and removed for cause.[400] In response to the defense's motion to obtain funding to retain a statistical expert, the State argued that the determination of prejudice is not based on mathematical or statistical analysis, and the motion for extraordinary expenses should be denied.[401]

The trial court set a hearing date of March 15, 2013, to hear arguments regarding the pending motions for change of venue.[402] However, on March 11, the District Attorney withdrew his opposition to the motion to change venue.[403] While noting that Updyke

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[392] Venue Motion II, *supra* note 363.
[393] *Id.* at 1.
[394] *Id.* at 1–2.
[395] *See id.* at 1.
[396] *See id.* at 2.
[397] *See generally* State's Response, *supra* note 367 (arguing that Updyke had not established presumed or actual prejudice).
[398] *Id.* at 2 (emphasis omitted).
[399] *Id.*
[400] *Id.*
[401] *Id.* at 3.
[402] Court Order, *supra* note 6, at 1.
[403] *See* Withdrawal of Opp., *supra* note 6.

and his attorney had failed to offer evidence of prejudicial news reports, the State reasoned that, in light of *Luong v. State*, media coverage and the community's involvement could have an adverse effect on the potential jurors.[404] The State made mention of the trial court's statement that due to the statewide coverage of Updyke's case, finding a venue free from publicity in Alabama may be a difficult task.[405] Noting the similarities in *Luong* with Updyke's present case regarding public outcry and involvement, coupled with extensive pretrial media coverage, the State reasoned that appellate courts likely may reverse any conviction against Updyke if venue was not changed.[406] The prosecution also looked at the practical possibility that the court may still grant a change of venue following more voir dire prior to the tentatively set court date of April 2013, and such pretrial proceedings may expend additional resources but leave the parties no closer to a resolution.[407]

The State's reference to *Luong*, at the time, appears well-founded given the similarity of the two cases—the defendants' confessions published in the news and the communities' involvement.[408] However, some factors weigh in favor of Lee County retaining venue, especially in light of the Alabama Supreme Court's reversing *Luong v. State*. As the case law indicates, the passage of time can have a mitigating effect on pretrial prejudice.[409] Furthermore, the defense produced almost no articles into the record showing a saturation of inflammatory news reporting within the community.[410] Although the trial judge has discretion over voir dire proceedings, the fact that many potential jurors in the initial voir dire proceedings had not been questioned indicates that the full effect of prior pretrial publicity was not known by the court or the parties.[411] Additionally, an argument regarding invited error exists in light of the fact that Updyke made numerous voluntary com-

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[404] *Id.* at 1–3.
[405] *See id.* at 2.
[406] *Id.* at 3–4. Also, Updyke's trial was scheduled in close proximity to Auburn University's A-Day spring football game, which may have exacerbated any pretrial notoriety. *Id.* at 3.
[407] *See id.* at 3.
[408] *See* Luong v. State, CR-08-1219, 2013 WL 598119, at *20 (Ala. Crim. App. Feb. 15, 2013); ESPN.COM, *supra* note 385; Yawn, *supra* note 370.
[409] Dannelly v. State, 254 So. 2d 434, 435 (Ala. Crim. App. 1971); *see Ex parte* State (*In re* Luong v. State), No. 1121097, 2014 WL 983288, at *6 (Ala. Mar. 14, 2014), *modified on denial of reh'g*, No. 1121097, 2014 WL 2139112 (Ala. May 23, 2014).
[410] Court Order, *supra* note 6, at 2. However, the defense likely would have presented some evidence had the hearing regarding the motion to change not been cancelled. *Id.*
[411] *See* State's Response, *supra* note 367, at 2.

ments in written newspapers, radio broadcasts, and television programs.[412] Also, given the notoriety of the case throughout the State of Alabama and the overall popularity of Auburn University and University of Alabama throughout the state, finding a county free from exception may have been difficult as a practical matter.[413]

The State's withdrawing opposition to change of venue appears to be a proper, reasonable decision in the interest of ensuring a fair trial. In light of *Luong*'s strong view towards community involvement (especially with the trial taking place in close temporal proximately to Auburn University's spring football game) and published stories of the defendant's confession indicates that the Court of Criminal Appeals would have seriously considered reversing any possible conviction. Notwithstanding this argument in favor of changing venue and in light of subsequent reversal of *Luong v. State* and the Alabama Supreme Court's interpretation of the *Skilling* factors, a reviewing court now would likely affirm a conviction in light of several factors. First, several months had passed between the June 2012 proceedings and the proceedings in the Spring of 2013, thus the timing of media coverage leans in favor of Lee County retaining the case. The defense had presented almost no evidence indicating inflammatory news coverage.[414] The population of Lee County, Alabama in 2013 was approximately 150,000 people,[415] and a reading of *Ex parte State* may find a presumption of prejudice in a community of that size.[416] However, a review of the filings indicates that neither the defense nor the state produced any population statistics as evidence and the defendant regularly contributed to pretrial publicity.[417] Moreover, the State could argue that the community's reaction to the poisoning of the trees more

[412] *See Luong*, 2013 WL 598119, at *4 (citing trial court record discussing possibility of Luong committing invited error which would otherwise taint his trial); Thompson, *supra* note 362 (profile article with interviews with Updyke); Enoch, *supra* note 5 (timeline of events, including Updyke's appearances on radio and television programs prior to trial); Yawn, *supra* note 370 (article claiming Updyke confessed to a newspaper).

[413] *See Ex parte State*, 2014 WL 983288, at *8 (citing Calley v. Callaway, 519 F.2d 184, 210 (5th Cir. 1975)) (in an era of easily-accessible information, cannot allow the publicity of well-known cases to "paralyze" the justice system).

[414] Court Order, *supra* note 6, at 2.

[415] U.S. Census Bureau, *Lee County QuickFacts from the U.S. Census Bureau*, U.S. CENSUS BUREAU: STATE AND COUNTY QUICKFACTS (last revised Jul. 8, 2014, 06:42:35 EDT), http://quickfacts.census.gov/qfd/ states/01/01081.html.

[416] *See Ex parte State*, 2014 WL 983288, at *5 (citing Rideau v. Louisiana, 373 U.S. 723 (1963)).

[417] *See* Venue Motion I, *supra* note 363; Venue Motion II, *supra* note 363; State's Response, *supra* note 367; Withdrawal of Opp., *supra* note 6; Court Order, *supra* note 6, at 2.

shows the mourning of a community tradition rather than prejudice towards Updyke.[418] Given the extremely high burden in proving the rare cases of presumed prejudice, if Updyke were to later raise an appeal, the appellate courts may very well have found that the trial court would not have abused its discretion in denying a motion to change venue. Ultimately, because the issue was not fully litigated, any predictions would be speculative. However because the issue was not resolved through full litigation, the case provides an interesting analytical exercise.

VI. CONCLUSION

Change of venue is a regularly argued issue in Alabama courts, and defendants have been arguing this issue since the 1840s.[419] Especially in light of the development of social media and the fast-paced arena of online news, publicity regarding high-profile trials is more prevalent and accessible.[420] Despite some difference in court decisions regarding the proper determination of the prejudicial effect of pretrial publicity, the overall analysis has seemingly remained consistent. Recognizing the reality that criminal cases—especially cases which will have great interest to the community—Alabama courts have followed a strict burden in eliminating frivolous claims of presumed prejudice by requiring a showing inflammatory and sensational reports coupled with a wide distribution of those materials within the community. Furthermore, the practical burden in proving actual prejudice has also limited the success of defendants arguing they were wrongly denied a change of venue.

The true confusion in arguing change of venue appears in the differing language regarding the standard of review on appeal. While the plain language of the statute indicates a de novo review without a presumption in favor of the trial court's decision,[421] many courts have applied an abuse of discretion standard that would indicate deference to the trial court's decision.[422] However, the Alabama courts have seemingly resolved this by reviewing for abuse of discretion under a de novo standard, where the appellate courts

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[418] *See Ex parte State*, 2014 WL 983288, at *8.

[419] *See generally* State v. Ware, 10 Ala. 814 (1846) (early Alabama Supreme Court case addressing change of venue).

[420] *See Ex parte State*, 2014 WL 983288, at *3, *8 (citing Calley v. Callaway, 519 F.2d 184, 210 (5th Cir. 1975)).

[421] *See* ALA. CODE § 15-2-20(b) (LexisNexis 2011); Wilson v. State, 480 So. 2d 78, 80 (Ala. Crim. App. 1985) (citing Gilliland v. State, 277 So. 2d 901, 903 (Ala. 1973)).

[422] *E.g.*, Hunt v. State, 642 So. 2d 999, 1042 (Ala. Crim. App. 1993) (abuse of discretion is the "yardstick" by which to judge the trial court's decision).

independently review the record and determine if the trial court's decision was plainly erroneous.[423] Perhaps the Alabama courts will soon resolve any confusion reanalyzing their lines of cases and present a clearer view. If one attorney looks to the statute and seeks de novo review based on his interpretation of the state and his opposing counsel urges an abuse of discretion standard based on a long line of cases, a situation arises where neither appears wrong. Furthermore, which side of the courtroom an attorney sits often will affect which standard of review to seek. Defense counsel will vigorously argue for a de novo review, hoping the reviewing court will see the circumstances differently. The prosecution will argue for a review upon abuse of discretion, advocating for the trial court's decision to stand.[424] In the end, the courts seem to apply a hybrid rule, which seems to be very complex and somewhat misleading. The appellate courts are supposed to review the evidence regarding change of venue de novo and not presume the trial court ruled properly, however then the court recognizes the trial court's discretion and first-hand observance of the proceedings to determine if the court abused that discretion.[425] This standard can be contradictory. How can a court review the decision without a presumption in favor of the ruling then hold that the appellate courts should leave the decision to the discretion of the trial court? However confusing this review may appear, it appears to be the law of the land. Ultimately, which standard a practitioner uses seems to depend on which side of the argument the lawyer represents.

Furthermore, following the Alabama Supreme Court's recent decision in *Ex parte State*, meeting the burden for change of venue appears increasingly difficult. Luong's case involved widespread media attention in the community, active participation by citizens in the recovery effort, and publication of the defendant's confession and withdrawn guilty plea.[426] While the court's position that jurors anywhere cannot be expected to know nothing of cases of statewide—or even nationwide—interest, one could wonder if communities further from the scene of horrific crimes have less interest.[427] Essentially, the Supreme Court, without saying as much,

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[423] State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996).

[424] The State of Alabama seemingly adopted this very position when it argued to for the Alabama Supreme Court to recognize "the principle that the law vests the trial court with discretion in determining how to ensure the impartiality of a jury." *Ex parte State*, 2014 WL 983288, at *3 (Ala. Mar. 14, 2014).

[425] *See* Flurry v. State, 289 So. 2d 632, 635 (Ala. Crim. App. 1973) (citing Littlefied v. State, 63 So. 2d 565 (Ala. Ct. App. 1952)).

[426] *Ex parte State*, 2014 WL 983288, at *3 (Ala. Mar. 14, 2014).

[427] *See id.* at *8 (quoting *Calley*, 519 F.2d at 210).

seemingly endorses the State's position "that criminal trials should be held in the communities where the crime occurred" as a highly important principle.[428]

Ultimately, like making any motion or arguing any position, trial attorneys arguing for change of venue must take meticulous care to follow procedure in making the application, provide ample factual proof of prejudice, and be prepared to meet an extremely high burden in proving the necessity to move the trial.

[428] *See id.* at *3.